DOCKET

No. 86-1992-CFX
Status: GRANTED

Title: Immigration and Naturalization Service, Petitioner
v.
Antolin Punsalan Pangilinan, et al.

Docketed:
June 12, 1987

Court: United States Court of Appeals
for the Ninth Circuit

Vide:
86-2019

Counsel for petitioner: Solicitor General

Counsel for respondent: Ungar,Donald L., Mautino,Robert A.

NOTE* Time to file ext by O'Connor, J., cited

Entry	Date	Note	Proceedings and Orders
1	May 1 1987		Application for extension of time to file petition and order granting same until June 13, 1987 (O'Connor, May 5, 1987).
2	Jun 12 1987	G	Petition for writ of certiorari filed.
3	Jun 12 1987		Appendix of petitioner INS filed.
4	Jun 15 1987		Lodging received.
6	Jul 7 1987		Order extending time to file response to petition until August 18, 1987.
8	Jul 13 1987		Order extending time to file response to petition until August 18, 1987.
9	Jul 13 1987		The above extension applies to all respondents.
10	Aug 7 1987		Brief of respondent Mario V. Litonjua in opposition filed.
11	Aug 12 1987		DISTRIBUTED. September 28, 1987
12	Aug 21 1987	X	Brief of respondents Antolin P. Pangilinan, et al. in opposition filed.
13	Sep 8 1987	X	Reply brief of petitioner INS filed.
14	Oct 5 1987		Petition GRANTED. The case is consolidated with 86-2019, and a total of one hour is allotted for oral argument. **********
15	Oct 30 1987	G	Motion of the Solicitor General to dispense with printing the joint appendix filed.
16	Nov 9 1987		Motion of the Solicitor General to dispense with printing the joint appendix GRANTED.
18	Nov 19 1987		Order extending time to file brief of petitioner on the merits until December 4, 1987.
19	Dec 4 1987		Brief of petitioner INS filed. VIDED.
21	Dec 18 1987		Order extending time to file brief of respondent on the merits until January 22, 1988.
22	Jan 5 1988		SET FOR ARGUMENT. Wednesday, February 24, 1988. This case is consolidated with No. 86-2019. (4th case).
23	Jan 5 1988		CIRCULATED.
24	Jan 22 1988	X	Brief of respondent Mario V. Litonjua filed. VIDED.
25	Jan 22 1988	X	Brief of respondent Bonifacio Lorenzana Manzano filed. VIDED.
26	Jan 22 1988	X	Brief of respondents Antolin P. Pangilinan, et al. filed.
27	Feb 16 1988	X	Reply brief of petitioner INS filed. VIDED.
28	Feb 24 1988		ARGUED.

PETITION FOR WRIT OF CERTIORARI

86 1992

No.

FILED
JUN 12 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1986

IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

ANTOLIN PUNSALAN PANGILINAN, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether Philippine veterans of World War II, whose opportunity to apply for American citizenship under greatly liberalized conditions expired in December 1946, are nonetheless currently entitled to citizenship because, during a nine-month period between October 1945 and August 1946, there was no designated examiner stationed in the Philippines to whom they could have applied for naturalization.

PARTIES TO THE PROCEEDINGS

Petitioner is the Immigration and Naturalization Service. Respondents are Antolin Punsalan Pangilinan, Panfilo Jabalde, Fidel Zosimo Usi Canilao, Antonio Patdo Tantay, Arcadio Revilla Nepomuceno, Dionisio Vallejos Lucas, Oliver Juan Posadas, Vicente Miranda Belizario, Rodolfo De Jesus Batac, Pedro Dumlao Ponciano, Cesar Jocson Ascalon, Winifredo Pableo Bello, Bonifacio Leoncio Zarcal, Benjamin Natividad Bonus, and Mario Valderrama Litonjua.

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No.

IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

ANTOLIN PUNSALAN PANGILINAN, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the Immigration and Naturalization Service, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals on remand from this Court (App. 1a-24a[1]) is reported at 796 F.2d 1091. The dissenting opinion from the denial of rehearing en banc (App. 29a-41a) is reported at 809 F.2d 1449. The original opinion of the court of appeals (App. 42a-53a) is reported at 694 F.2d 603. The opinion of one district court (App. 54a-59a) is reported at 511 F. Supp. 630. The opinion of the other district court (App. 60a-61a) is unreported. The findings and recommendations of the designated naturalization examiners (App. 62a-127a, 130a-160a) are likewise unreported.[2]

[1] "App." refers to the separately bound appendix to this petition.

[2] This case involves two appeals that were consolidated in the court of appeals: *Pangilinan, et al.* v. *INS* (caption below) and *Litonjua* v. *INS* (caption below). One naturalization examiner was assigned to handle the cases of all 14 respondents in *Pangilinan, et al.* His legal analysis is essentially identical in each case. Accordingly, we have

JURISDICTION

The judgments of the court of appeals (App. 25a-27a) were entered on August 11, 1986. A petition for rehearing was denied on February 13, 1987 (App. 28a-29a). On May 5, 1987, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including June 13, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Sections 701, 702, and 705 of the Nationality Act of 1940, as amended by the Second War Powers Act, 1942, ch. 199, § 1001, 56 Stat. 182-183, 8 U.S.C. (Supp. V 1945) 1001, 1002, and 1005, and Section 310(e) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1421(e), are reproduced in the Appendix (App. 161a-163a).

STATEMENT

Respondents are 15 Philippine veterans of World War II who, between June 1978 and April 1980, filed petitions for naturalization under Section 701 of the Nationality Act of 1940 (the 1940 Act or the Act), 8 U.S.C. (Supp. V 1945) 1001, as added by the Second War Powers Act, 1942, ch. 199, § 1001, 56 Stat. 182 (App. 62a-127a, 130a-160a; Lodging 326-463).[3] Under this Section, aliens who served in the American Armed Forces during World War II were permitted to apply for citizenship under greatly liberalized conditions. As part of the program, servicemen on active duty outside the United States were allowed under Section 702 of the Act to obtain naturalization overseas by applying to special examiners designated by the Commissioner of Immigration and Naturalization (the Commissioner). As amended by Section 1(c)(1) of the Act of Dec. 28, 1945, ch. 590, 59 Stat. 658, Section 701 specified that any petition submitted thereunder had to be filed no later than December 31, 1946.

Respondents made no effort to apply for overseas naturalization while on active duty in the Philippines (App. 4a-6a, 63a, 87a, 89a-129a, 131a-132a). Nor did they attempt to enforce their alleged entitlement to citizenship under the 1940 Act until more than 30 years after the cutoff date. Nevertheless, the court of appeals ordered that all of them be granted citizenship.

1. a. The events leading to the present case began more than 40 years ago. In 1942, Congress amended the 1940 Act to provide liberalized conditions for the naturalization of aliens who served honorably in the United States Armed Forces during World War II. Section 701 exempted certain alien servicemen who served in areas outside the continental United States from various naturalization requirements, such as literacy in English and a period of residence in the United States. Section 702 provided for the overseas naturalization of persons serving in the United States Armed Forces who were eligible for naturalization under Section 701 but who were beyond the jurisdiction of the United States naturalization courts. Under Section 702, representatives designated by the

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reproduced the complete findings and recommendations in only one of the cases, that of respondent Pangilinan (App. 62a-88a). With respect to the other 13 *Pangilinan* respondents, we have reproduced only individualized excerpts (*id.* at 89a-127a), but have lodged with the Clerk of the Court copies of the unedited versions (Lodging 1-325). In addition, we have lodged with the Clerk one set of appendices to the findings and conclusions in the *Pangilinan* cases (Lodging 464-547), which are identical in each of the 14 cases. We have also reproduced the unedited findings and recommendations of the naturalization examiner in *Litonjua* (App. 130a-160a).

[3] The 1940 Act was repealed by Section 403(a)(42) of the Immigration and Nationality Act of 1952 (the 1952 Act), ch. 477, 66 Stat. 280 .

Commissioner were authorized to receive petitions, conduct hearings, and grant naturalization outside the United States. Section 705 authorized the Commissioner, with the Attorney General's approval, to make such rules and regulations as were necessary to carry into effect the provisions of Sections 701-702. See *INS* v. *Hibi*, 414 U.S. 5, 6-7 (1973).

The great bulk of alien servicemen were naturalized by naturalization courts in this country, but thousands were naturalized pursuant to Section 702 by immigration officers traveling on rotation throughout England, Iceland, North Africa, and the islands of the Pacific.[4] The 1940 Act could not be carried out in the Philippines between 1942 and 1945 because of the Japanese occupation. Nonetheless, approximately 7000 Filipino service members were naturalized in places outside the Philippines.[5] See *Hibi*, 414 U.S. at 10 (Douglas, J., dissenting); *Olegario* v. *United States*, 629 F.2d 204, 209 (2d Cir. 1980), cert. denied, 450 U.S. 980 (1981); *In re Naturalization of 68 Filipino War Veterans* (*68 Filipinos*), 406 F. Supp. 931, 935 (N.D. Cal. 1975).

Following the liberation of the Philippines by Allied Forces and the resolution of certain issues as to the applicability of Sections 701-702 to various Filipino servicemen,[6] the provisions of the 1940 Act were implemented

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[4] Most of the overseas naturalizations were performed by one individual, Dr. Henry Hazard (Lodging 523). A total of 6574 alien servicemen were naturalized by Hazard between 1943 and 1945 (Lodging 543-544). Between 1942 and 1944, 80,062 alien servicemen were naturalized by naturalization courts in this country (Lodging 545-547).

[5] Between 1942 and 1944, 5919 Filipinos were naturalized by naturalization courts in this country (Lodging 545-547). Dr. Hazard naturalized 923 Filipinos during his overseas visits (Lodging 544).

[6] One issue was whether service in the Philippine Commonwealth Army constituted service in the United States military forces for purposes of Section 701. A question existed because that army (which, with guerrilla units, was estimated at between approximately 166,000 and 270,000 men), was an arm of the Philippine government and was simply incorporated into the United States Armed Forces by a Presidential Order in 1941. By contrast, a much smaller unit known as the Philippine Scouts (consisting of about 6200 men) was an integral unit of the United States Army, since its members had individually enlisted in the American Armed Forces. See Lodging 506, 508. In 1945 the Attorney General determined that members of both Philippine units were covered by Section 701. Congress subsequently enacted the First Supplemental Surplus Appropriation Rescission Act, 1946, ch. 30, 60 Stat. 14 (Rescission Act), which provided, in relevant part, that service in the Philippine Commonwealth Army was not to be deemed service in the American Armed Forces for purposes of any federal statute conferring benefits on military veterans. See note 27, *infra*. Based on the Rescission Act, the Attorney General reversed his previous position. The government maintained that revised position until 1957, when a district court held that the Rescission Act did not take away the naturalization rights of members of the Philippine Commonwealth Army (*Petition of Munoz*, 156 F.Supp. 184 (N.D. Cal. 1957)). See *Olegario*, 629 F.2d at 209-210 & nn.3, 5.

A second issue concerned the eligibility of Filipinos who had never resided in the United States. The Attorney General concluded that prior residence in the Philippines, then an American possession, satisfied the requirement of Section 701 that the applicants have been "lawfully admitted into the United States, including its Territories and possessions." See *Olegario*, 629 F.2d at 209 n.3.

in the Philippines. In early August 1945, the Immigration and Naturalization Service (INS) designated George Ennis, an American vice consul in Manila, to naturalize aliens pursuant to Section 702. The Philippine government subsequently expressed its concern to the State Department that the mass migration to this country of perhaps as many as 250,000 newly naturalized veterans would drain its soon-to-be independent country[7] of essential manpower and undermine post-war reconstruction efforts. In September 1945,

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[7] The Philippines were scheduled to become an independent country on July 4, 1946. Philippine Independence Act of 1934, ch. 84, § 10(a), 48 Stat. 463.

the Commissioner recommended to Attorney General Tom Clark that the problem be resolved by revoking Vice Consul Ennis's naturalization authority.[8] The Attorney General approved the recommendation, and naturalizations in the Philippines ceased in late October 1945. App. 3a, 44a; *Olegario*, 629 F.2d at 209-210.

In August 1946, the INS designated a new naturalization official for the Philippines, P.J. Phillips, who naturalized approximately 4000 Filipinos between August 1946 and the December 31, 1946, cutoff date.[9] No INS official was present in the Philippines to implement the 1940 Act during the nine-month period between October 1945 and August 1946. App. 3a, 44a; *Olegario*, 629 F.2d at 211.

b. In the past two decades there has been a stream of litigation as a result of belated efforts by Filipino veterans to obtain naturalization under the 1940 Act. These veterans have asserted that they were denied statutory and constitutional rights as a result of the nine-month absence of a naturalization examiner in the Philippines. Several of these prior Filipino veteran cases provide essential background for the present case.

In *INS* v. *Hibi*, 475 F.2d 7, rev'd, 414 U.S. 5 (1973), the Ninth Circuit held that the government was equitably estopped from denying naturalization to Hibi, a Filipino veteran, based on the statute's expiration date. This Court reversed, holding that the government's revocation of Ennis's authority and its failure to publicize the rights available to Filipino veterans under the 1940 Act did not give rise to an estoppel against the government.

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[8] The INS took the position that Section 702 authorized but did not mandate the designation of overseas examiners (Lodging 513).

[9] This new examiner was designated after the Attorney General concluded, based on the enactment of the Rescission Act, that members of the Commonwealth Army were not members of the American Armed Forces and therefore were ineligible for the liberalized naturalization benefits under Section 701. See note 6, *supra*.

Two years later, in *68 Filipinos*, the district court granted the petitions for naturalization of numerous Filipino veterans. The court classified the veterans into three groups: (1) "Category I": those who took affirmative steps to apply for naturalization while on active duty in the Philippines but whose applications were not acted upon before the statutory deadline; (2) "Category II": those who, like respondents, had not sought naturalization in a timely manner but who could have qualified had they done so; and (3) "Category III": those who were unable to establish that they had ever qualified under Sections 701-702. The court granted the petitions of the Category I and II veterans but denied those of the Category III veterans (406 F.Supp. at 936-937).[10]

The government appealed the district court's decision in *68 Filipinos* and filed a brief, but it later withdrew the appeal after a new administration took office. The government later reevaluated its position and decided that it would challenge the petitions of Category II veterans. Subsequently, in a case involving a different Filipino veteran, the Ninth Circuit held that because the government had withdrawn its appeal in *68 Filipinos*, it was collaterally estopped from contesting petitions for naturalization of other Filipino veterans who qualified under Sections 701-702 of the 1940 Act. This Court reversed. *United States* v. *Mendoza*, 464 U.S. 154 (1984), rev'g 672 F.2d 1320 (9th Cir. 1982).

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[10] With respect to the Category I veterans, the court held that their petitions should be treated as "constructively filed" and that the government was equitably estopped to contest the petitions because of its failure to process the applications (406 F.Supp. at 938-939). With respect to the Category II veterans, the court held that they were entitled to citizenship because the government's revocation of the vice consul's authority violated their due process rights (*id.* at 948-951). Since the *68 Filipinos* case, the government has adopted a policy of not opposing naturalization petitions of Category I veterans.

2. a. The present case represents the third phase of the attempts of Filipino veterans to obtain naturalization under the now-expired 1940 Act. All of the respondents except Litonjua filed their petitions in the United States District Court for the Northern District of California. Those *Pangilinan* respondents[11] stipulated with the government that their legal claims were identical to those of the Category II veterans in *68 Filipinos* (App. 4a, 45a, 128a-129a)—namely, they were all on active duty in the Philippines for at least part of the period between October 1945 and August 1946, when there was no designated examiner in the Philippines, and they made no effort to apply for naturalization prior to the expiration of the liberalized naturalization provisions. Indeed, most of them did not even learn about the availability of citizenship for World War II veterans under the 1940 Act until the late 1970s.[12] One naturalization examiner was designated to

[11] The case of *Pangilinan, et al.* involves 14 veterans (referred to collectively as the "*Pangilinan* respondents"). The *Litonjua* case involves only a single veteran. See note 2, *supra*.

[12] Respondent Pangilinan claimed in his petition for naturalization that, "[a]fter [his] discharge [he] inquired with the Veterans Administration in 1946 to become a U.S. citizen but they told [him he] was not eligible" (Lodging 334). He later stipulated with the government that he was a Category II veteran (App. 128a), and the designated naturalization examiner found that Pangilinan "offered no evidence to establish that he attempted to apply for or even inquired about naturalization while he was on active duty, and prior to the expiration of the law on December 31, 1946" (*id.* at 63a). The other 13 veterans conceded in their petitions that they did not even learn of the availability of naturalization for veterans until after 1946. Specifically, respondents Canilao and Tantay first learned in 1947 that they could have applied for citizenship (Lodging 353, 362); respondents Ascalon and Zarcal first learned in 1948 (*id.* at 428, 448); respondent Jabalde first learned in 1976 (*id.* at 344); respondents Lucas, Batac, Ponciano, Bello, and Bonus first learned in 1977 (*id.* at 380, 408, 419, 439, 455); respondents Nepomuceno and Belizario first learned in 1978 (*id.* at 371, 398); and respondent Posadas first learned "a few years" prior to 1979 (*id.* at 389).

handle the cases of all of the *Pangilinan* respondents. Rejecting the reasoning of the district court in *68 Filipinos*, he recommended against naturalization.[13] On September 24, 1980, upon consideration of the examiner's recommendation and the Second Circuit's *Olegario* decision,[14] the district court denied the petitions of the 14 respondents in a single order (App. 60a-61a). Those cases were consolidated for purposes of appeals.[15]

b. Respondent Litonjua's petition was filed in the United States District Court for the Southern District of California. Litonjua, who served in the Philippines from May 1941 to April 1946 as a member of the United States Navy, made no effort to apply for naturalization while on active duty. He made preliminary efforts to obtain citizenship during a visit to the United States after his discharge, but did not complete the petition process prior to the cutoff date.[16] The naturalization examiner recommended

[13] Specifically, he concluded that: (1) the petitions of the *Pangilinan* respondents were barred by Section 310(e) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1421(e), which precludes naturalization under expired or superseded statutory provisions; (2) the claims were barred by laches and by the veterans' failure to show that they were injured by the absence of an examiner; (3) the claims were nonjusticiable because the Attorney General's actions involved issues of foreign policy that were within the sole prerogative of the Executive Branch; (4) the veterans' due process claims were nonmeritorious; and (5) their claims were barred by *Hibi*. App. 67a-87a.

[14] In *Olegario*, the Second Circuit rejected a Filipino veteran's claim of entitlement to citizenship, holding, inter alia, that the decision to revoke Vice Consul Ennis's authority for foreign policy reasons was properly within the discretion of the Executive Branch and was not barred by the 1940 Act.

[15] The district court actually ruled on and denied 17 petitions, but only 14 of the veterans filed appeals.

[16] Specifically, Litonjua made inquiries at the INS during late July or early August of 1946 while in Seattle as a civilian employee of the United States Army Transport Service. He apparently submitted some

that Litonjua's petition be denied;[17] the district court agreed and denied Litonjua's naturalization petition on April 9, 1981 (App. 54a-59a). Although it concluded that Litonjua's claim was not barred by the political question doctrine, laches, or this Court's *Hibi* decision, the court followed *Olegario* and held that the Attorney General's revocation of the vice consul's authority was proper (*id.* at 56a-59a).

c. The veterans appealed, and Litonjua's case was consolidated with those of the *Pangilinan* respondents. Applying its *Mendoza* decision, which had not yet been overturned by this Court (see page 7, *supra*), the court of appeals reversed the two district courts on collateral estoppel grounds (App. 42a-53a). After this Court reversed the Ninth Circuit in *Mendoza*, it also vacated the court of appeals' collateral estoppel judgments in the present case (*INS* v. *Litonjua*, 465 U.S. 1001 (1984), rev'g *Barretto* v. *United States*, 694 F.2d 603 (1982) (App. 42a-53a)),[18] thus setting the stage for the current phase of the litigation.

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sort of paperwork, although the nature of that paperwork is unclear. In any event, although Litonjua was instructed by the INS not to leave the Seattle area without first notifying that office, he left Seattle on August 17, 1946, without following those instructions. Litonjua made no effort to contact the INS until he returned to Seattle in January 1947 and was informed that the naturalization program for veterans had expired. Litonjua then waited 31 years before filing a petition for naturalization. App. 132a-133a. The court of appeals treated Litonjua as a Category II veteran and for that reason did not reach his claim that he should be treated as a Category I veteran even though he did not pursue naturalization while overseas (App. 6a n.3; see also *id.* at 45a-46a n.3).

[17] The reasons given by the examiner were essentially the same as those of the examiner in *Pangilinan, et al.* (App. 130a-160a). See note 13, *supra*.

[18] Veteran Barretto is no longer part of this litigation because the court of appeals granted him citizenship for reasons unique to his case (see App. 52a-53a).

3. On remand from this Court, the court of appeals did not reach respondents' due process claims. Rather, it "avoid[ed] deciding this substantial constitutional question" (App. 20a) and instead held that the revocation of Vice Consul Ennis's naturalization authority violated the 1940 Act and that, as a consequence, belated naturalization was appropriate as an equitable remedy (*id.* at 11a-24a).

At the outset, the court concluded, with no elaboration, that this Court's *Hibi* decision was not relevant because respondents were "rais[ing] statutory and constitutional arguments neither presented to nor addressed by the Supreme Court in *Hibi*" (App. 11a).[19] On the issue whether the Attorney General lawfully revoked the vice consul's naturalization authority, the court held that "there is little room for doubt" that the Attorney General's action was contrary to " 'the expressed will of Congress' " (*id.* at 16a (citations omitted)). The court stated that the language of Sections 702 and 705 was "mandatory, not discretionary," and contained "no express or implied delegation of authority to the Attorney General to deny the benefits of the Act to eligible aliens for any reason" (*ibid.* (footnote omitted)). The court therefore refused to "find an implied intent to defer to the Attorney General's judgment that benefits under the Act should be withheld from Filipinos in response to postwar manpower concerns expressed by Philippine officials" (*id.* at 17a).

The court acknowledged (App. 20a) that its interpretation of the 1940 Act conflicts with the Second Circuit's holding in *Olegario* that the Attorney General's action was permissible under that Act. It concluded, however, that the Second Circuit's analysis is "unpersuasive" (App. 21a),

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[19] The Court also rejected the government's arguments that the issue was a nonjusticiable political question, that 8 U.S.C. 1421(e) precluded respondents' naturalization, and that respondents' petitions were barred by laches (App. 7a-10a).

and noted that *Olegario* was decided before this Court stated in *INS* v. *Miranda*, 459 U.S. 14 (1982), that "the Attorney General's 'error was clear' when he revoked [the vice consul's] naturalization authority in 1945" (App. 21a).[20]

The court then addressed the question whether it had power to remedy the Attorney General's "transgression" by granting respondents naturalization notwithstanding the untimeliness of their petitjons (App. 22a). It stated that a federal court has "broad remedial powers" and is authorized to "adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action" (*ibid.* (citation omitted)). In the court's view, because "[t]here [was] simply no other way to restore the lost opportunity for citizenship that Congress offered [Filipino veterans] as a just reward for their military service in World War II," granting naturalization to respondents was "the only effective remedy available to 'rectify the agency action taken' " (*id.* at 23a (citation omitted)).

4. The court subsequently denied the government's petition for rehearing and suggestion for rehearing en banc, with Judge Kozinski, writing for himself and seven other judges, dissenting from the denial of rehearing en banc (App. 29a-41a). In disputing the panel's conclusion that the 1940 Act gave Philippine servicemen a "right" to citizenship, the dissenting judges agreed with the Second Circuit in *Olegario* that, at most, the statute provided such

[20] In *Miranda*, the Court held that the government's 18-month delay in processing an application for adjustment of status did not give rise to a claim of estoppel. No issue involving citizenship for Filipino yeterans was involved. In reaching its conclusion in regard to Miranda's claim, the Court stated (459 U.S. at 18) that, "[u]nlike *Montana* [v. *Kennedy*, 366 U.S. 308 (1961)] and *Hibi*, where the Government's error was clear, the evidence that the Government failed to fulfill its duty in this case is at best questionable."

servicemen " 'with *an opportunity* to become * * * citizen[s].' " *Id.* at 30a (emphasis added by dissent (quoting *Olegario*, 629 F.2d at 224)). The dissent also agreed with *Olegario* that the statute gave the Attorney General "very broad discretion" in "implementing the naturalization program," and that foreign relations was "a proper concern of the executive branch" in the decision to withdraw the naturalization examiner from the Philippines (App. 32a).[21]

In addition, the dissent stated (App. 33a) that the panel had merely used a different label to achieve precisely what had already been rejected by this Court in *Hibi*. Indeed, even aside from the teachings of *Hibi*, the dissent maintained, the panel's invocation of equity power in this case was erroneous. It noted that, while equity courts have broad discretion to fashion a remedy, such discretion only arises "*once a right has been established*" (*id.* at 35a (emphasis in original)). Equity courts, the dissent asserted, have no authority to "enforce rights denied by statute" *(id.* at 36a). It pointed out that respondents failed to meet the statutory criteria for citizenship because their petitions were untimely (*ibid.*). The dissent concluded (*id.* at 41a) that the panel had "stretch[ed] the court's equity powers far beyond previously accepted limits."

REASONS FOR GRANTING THE PETITION

Notwithstanding this Court's prior reversals in *Hibi* and *Mendoza*, the Ninth Circuit has, for a third time, ordered the naturalization of Filipino veterans under a statute that

[21] The dissent noted that the 1940 Act "speaks in mandatory terms only in describing the steps the naturalization petitioner must take in applying for citizenship," and that "[i]n all other respects [it] * * * speaks in the permissive, leaving it to the 'Commissioner, with the approval of the Attorney General,' to establish the procedures for implementing the Act" (App. 31a (citation omitted)).

expired more than 40 years ago. In reaching this result, the court has undertaken to sit in judgment, decades after the fact, on the balance struck by the Attorney General between his obligations under Sections 701-705 of the 1940 Act and his responsibility, as an executive officer acting on behalf of the President, to consider this country's foreign policy interests when carrying out his duties. The court's rejection of any role for executive foreign policy discretion in the implementation of Sections 701-705 conflicts with the Second Circuit's holding in *Olegario*. This conflict will inevitably lead to forum-shopping by Filipino veterans seeking naturalization under the 1940 Act.

More fundamentally, the court has improperly asserted equitable authority in a manner that cannot be reconciled with the teachings of this Court. First, in granting citizenship under expired statutory provisions, the court ignored this Court's cases establishing that a naturalization court has no authority to dispense with congressionally-mandated requirements for citizenship. See, *e.g.*, *Fedorenko* v. *United States*, 449 U.S. 490, 517-518 (1981); *United States* v. *Ness*, 245 U.S. 319 (1917); *United States* v. *Ginsberg*, 243 U.S. 472 (1917). Second, the court's decision conflicts with *Hibi*, in which this Court confronted a claim identical to respondents' in all respects but one: the label given to the legal theory has been changed from "equitable estoppel" to "equitable remedy for denial of statutory rights." As the dissenting judges noted (App. 33a), "[t]here is no meaningful difference between saying that the government is equitably estopped from raising the statutory cutoff date and disregarding the cutoff date as a matter of equity." Finally, the court granted equitable relief without pausing to balance the equities. As this Court has emphasized, such a balancing is required, and, particularly when government conduct is involved, the need and justification for equitable relief must be clear. See, *e.g.*, *Eccles* v. *Peoples Bank*, 333 U.S. 426, 431 (1948).

The court of appeals' decision, if not corrected, will have a considerable impact in light of the thousands of Filipino veteran cases and potential cases that are pending administratively or have already reached the courts.[22] At this late date, the government will have great difficulty verifying the veterans' assertions that (1) they possessed the necessary qualifications under the expired 1940 Act,[23] and (2) had the opportunity been presented, they would have sought naturalization while that Act was still in effect. Moreover, the naturalization of these veterans would have a spillover effect. Once the veterans obtain citizenship, their spouses and minor children will be entitled to visas without regard to quotas. In addition, the unmarried adult children of the veterans will be able to obtain "first preference" visas, thus placing them ahead of other Filipinos awaiting visas under the quota system. See 8 U.S.C. 1151(b), 1153(a)(1). The court's decision thus

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[22] There are several pending Filipino veteran cases in the Ninth Circuit that will be governed by the ultimate disposition of this case. In addition, the INS is presently contesting more than 1100 petitions for naturalization under the 1940 Act in various district courts, and it also has before it for processing more than 3500 petitions filed by alleged Filipino veterans. Moreover, it has received approximately 5000 inquiries from Filipino veterans regarding the procedures for making application. Furthermore, the State Department informs us that since the present decision was issued, an estimated 80 to 110 Filipino veterans have applied for visas to come to this country for the purpose of applying for naturalization. Finally, some 200 civil actions have been filed in the United States District Court for the District of Columbia by World War II veterans residing in the Philippines who, in addition to claiming veterans' or welfare benefits, have applied for naturalization under the 1940 Act.

[23] In July 1973, a fire at the Military Personnel Record Center in St. Louis, Missouri, destroyed millions of Army records for the period between World War I and 1959. As the naturalization examiner for the *Pangilinan* respondents noted, "[w]ithout military records to verify alleged service the Government will be confronted with an administrative nightmare." App. 72a-73a.

threatens a serious distortion of both the naturalization and the immigration processes established by Congress.

For all of these reasons, review by this Court is plainly warranted.

1. The underlying premise of the Ninth Circuit's decision is that the Attorney General violated the 1940 Act by revoking the vice consul's naturalization authority. The court reached this conclusion despite its recognition (App. 3a) that the Attorney General had acted in response to concerns expressed by Philippine officials that the implementation of the 1940 Act in their country would result in the loss of critical manpower.

It is fundamental that decisions affecting our relations with foreign nations are entrusted to "the very delicate, plenary and exclusive power of the President" and that such power "does not require as a basis for its exercise an act of Congress * * *." *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936). See also *Regan* v. *Wald*, 468 U.S. 222, 243 (1984); *Dames & Moore* v. *Regan*, 453 U.S. 654 (1981); *Haig* v. *Agee*, 453 U.S. 280 (1981); *Goldwater* v. *Carter*, 444 U.S. 996, 1002-1006 (1979) (Rehnquist, J., concurring); *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103, 109-111 (1948); *Narenji* v. *Civiletti*, 617 F.2d 745 (D.C. Cir. 1979), cert. denied, 446 U.S. 957 (1980).[24] The

[24] These principles are particularly relevant to immigration and naturalization matters. See, *e.g.*, *Mathews* v. *Diaz*, 426 U.S. 67, 81-82 (1976) (footnote omitted) (noting that such matters "may implicate our relations with foreign powers" and that "[t]he reasons that preclude judicial review of political questions also dictate a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization"); *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-589 (1952) (footnote omitted) (indicating that "any policy toward aliens is vitally and intricately interwoven with contemporaneous policy in regard to the conduct of foreign relations" and that such matters are "largely immune from judicial inquiry or interference").

proper judicial inquiry is not, as the court below suggested, whether Congress specifically intended to grant the Attorney General authority to make the precise response to the concerns of Philippine officials that he made, but rather whether it intended to accord him generally "a degree of discretion and freedom from statutory restriction" that would enable him to implement Sections 701-702 in a manner that would avoid an adverse impact on our relations with another government. *Curtiss-Wright*, 299 U.S. at 320. That inquiry does not necessitate a search of the statutory language for either an express or an implied delegation of authority to the Executive Branch to take the foreign policy interests of this country into account. Rather, unless specifically negated, it is *always* the implied will of Congress to give the Executive Branch authority to implement legislation overseas in a manner which will not undermine this country's foreign policy interests. *Id.* at 319-321. See also *Japan Whaling Ass'n* v. *American Cetacean Society*, No. 85-954 (June 30, 1986), slip op. 19; *Zemel* v. *Rusk*, 381 U.S. 1, 17 (1965).

In holding that executive foreign policy discretion did not legitimize the Attorney General's actions, the court of appeals stated that the revocation of the vice consul's naturalization authority was " 'incompatible with the expressed will of Congress' " (App. 16a (citation omitted)).[25] Congress's "expressed will," according to the court, was

[25] The court relied heavily on a comment by this Court in *Miranda*, 459 U.S. at 18, that in *Hibi*, "the Government's error was clear" (App. 16a, 21a). See page 12 & note 20, *supra*. As the dissent below observed, however, "such heavy reliance on a stray remark made by the Court in an unrelated context by way of illustrating an entirely different point is misplaced. It is inconceivable that the Court resolved this important and difficult question in such an off hand manner in a case where it was not argued, briefed or even at issue" (App. 32a).

The court gave several additional reasons as well, all of which lack merit. First, it noted (App. 18a n.12) that no one "with responsibility for foreign affairs participated" in the revocation decision. But the

that "eligible aliens" not be denied the benefits of Sections 701-702 "for any reason" (App. 16a). But the Attorney General did not directly deny the benefits of the 1940 Act to respondents; he did not, for example, direct that naturalization petitions filed by them or others similarly situated not be processed. What the court apparently meant was that revocation of the vice consul's naturalization authority had the *practical effect* of denying them the Act's benefits because, during the subsequent nine months, they were left without a special examiner to whom they could submit their overseas petitions (see *id.* at 21a-22a). Such revocation can be said to have violated Congress's "expressed will," however, only if the statute required the Attorney General to ensure that *all* eligible servicemen had a *continuous* opportunity to apply for overseas naturalization during the time that they were eligible for that benefit.

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court errs in suggesting that only subordinates possessing formal responsibility for foreign affairs are entitled to make decisions affecting foreign policy. See, *e.g.*, *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 542-543 (1950). Second, the court indicated (App. 18a) that the Philippines were not a proper subject of the exercise of foreign policy discretion because they were a territory in 1945 and thus under congressional regulation under Art. IV, § 3, Cl. 2 of the Constitution. But the independence of the Philippines was imminent, and the Attorney General's decision was clearly made in contemplation of a soon-to-be independent nation. Third, the court noted (App. 18a) that Congress, with the approval of Philippine officials, authorized the recruitment of 50,000 Filipinos to serve in our postwar occupation forces. But there is a significant difference between conferring citizenship on veterans (resulting in a permanent loss of manpower to the Philippines) and the temporary loss of manpower resulting from service in the occupation forces. Indeed, members of Congress and Philippine officials contemplated that the Philippines would benefit by later having trained servicemen as the nucleus for a Philippine army. See *Second Supplemental Surplus Appropriation Rescission Bill, 1946: Hearings on H.R. 5604 Before the Subcomm. of the Senate Comm. on Appropriations*, 79th Cong., 2d Sess. 32 (1946) (remarks of Sen. Hayden) [hereafter *1946 Hearings*]. See generally *Olegario*, 629 F.2d at 227.

If that was Congress's intent, the entire overseas naturalization program established by the Commissioner and the Attorney General was fatally flawed. In fact, however, the authority granted to the Executive Branch to implement the 1940 Act necessarily included a degree of discretion in enforcing its provisions. Since no mandatory procedures, schedules, or timetables were prescribed for the assignment of INS representatives to overseas locations, the Attorney General and the Commissioner were free, for example, to adopt a post-to-post rotation system for examiners, even though that system did not provide continuous availability of a naturalization examiner. See *Olegario*, 629 F.2d at 226.

Indeed, the Ninth Circuit agreed that Congress did not require that examiners be made "continuously available to alien servicemen wherever they may be stationed" (App. 13a). It found, nonetheless, that the absence of such a requirement was irrelevant because the vice consul's authority was not revoked as part of a program for making the most effective use of "limited personnel" (*ibid.*). According to the court, the Attorney General "was expected to carry out the mandate of Congress in an even-handed, nondiscriminatory manner" (*id.* at 19a), and Congress could not have "intended to license the Attorney General to deny the benefits of the 1940 Act to Filipinos as a class" (*id.* at 18a (footnote omitted)).

It is apparent, however, that the Attorney General did not deny the benefits of the 1940 Act to "Filipinos as a class"; the 7000 Filipinos who were naturalized outside the Philippines attest to that. Revocation of the vice consul's authority affected the naturalization opportunity of only a subclass, *i.e.*, those Filipinos who were in military service in the Philippines, for the most part as members of the Commonwealth Army or its guerrilla components.[26] Since

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[26] Of the 15 respondents in this case, for example, 13 served in the Commonwealth Army or its guerrilla units (App. 63a, 90a, 93a, 99a, 102a, 105a, 108a, 111a, 114a, 117a, 120a, 123a, 126a).

Filipinos were not affected "as a class" by the revocation decision, the clear expression of congressional intent necessary to deny foreign policy discretion to the Executive Branch cannot be found in generalized congressional expectations of an even-handed and nondiscriminatory implementation of the 1940 Act.[27]

Thus, as the Second Circuit held in *Olegario* (629 F.2d at 227), the authority granted to the Executive Branch to implement Sections 701-702 without specific guidelines or restrictions "was sufficient to permit the executive to exer-

[27] Ironically, while the court of appeals purported to be carrying out Congress's clearly expressed intent, it is anything but clear that Congress contemplated that its citizenship offer would extend to the estimated 166,000-270,000 Filipinos serving in their own national army (see note 6, *supra*). The intent of Sections 701-702 was to encourage and reward the enlistment of aliens into our armed forces. See, *e.g.*, 88 Cong. Rec. 1797-1798 (1942) (remarks of Rep. Celler). Filipinos who were members of the Commonwealth Army and its guerrilla components, however, fought primarily to ensure the independence of their own country. See *1945 Hearings* 60. Indeed, in 1946, Congress enacted the Rescission Act, which provided, subject to certain exceptions, that service in the Philippine Commonwealth Army was not to be equated with service in the American Armed Forces for the purpose of any law "conferring rights, privileges, or benefits" by reason of service in the American Armed Forces. Senator Hayden, one of the bill's co-authors, later noted that the provision "cancel[ed] any right which soldiers in the Philippine Army *may* have had to become citizens of the United States under the Nationality Act of 1940, as amended" (*ibid.* (emphasis added)). Senator Hayden explained that "[i]t was the view of the committee that the approximately 200,000 Filipinos who first and last served in that army did so because they fervently desired freedom for their country and not with the idea of acquiring the right to go to another country" (*ibid.*). He added that "[i]t would be the worst kind of public policy practically to invite them to leave their homes, where their position as patriots is recognized, and come to the United States, where, as immigrants, they would have to begin at the very bottom of the economic ladder to make their way upward" (*ibid.*). The court that decided *Munoz* (see note 6, *supra*) was apparently unaware of Senator Hayden's statements.

cise some discretion when confronted with a seemingly delicate foreign affairs matter." The court of appeals should not have second-guessed the sensitive foreign policy decisions made by the Executive Branch more than four decades ago. Cf. *Japan Whaling Ass'n*, slip op. 19.

2. In contrast to the lack of evidence that Congress intended to restrict the Attorney General's discretion to consider and respond to foreign policy implications of the naturalization program, Congress's intent on another issue was unmistakably clear: petitions for naturalization under Sections 701-702 had to be filed no later than December 31, 1946. See *Hibi*, 414 U.S. at 8.

a. The court of appeals purported to invoke principles of equity to justify its disregard of the cutoff date. Contrary to the court's assumption, however, equity provides no such authority. The broad equity powers which the court invoked (App. 23a) arise only *after* "a right and a violation have been shown." *Swann* v. *Charlotte-Mecklenburg Bd. of Education*, 402 U.S. 1, 15 (1971). Absent such a showing, there is no basis for the exercise of judicial "remedial power" (*id.* at 16). The court of appeals apparently proceeded on the assumption that Sections 701 and 702 granted respondents a "right" to citizenship that was denied by the revocation of the vice consul's naturalization authority (see App. 20a), and that the requisite showing had therefore been made. But as the Second Circuit held in *Olegario* (629 F.2d at 223-224), those Sections did not grant "a vested right to citizenship," but merely provided a "mechanism" which extended an "opportunity" to apply for overseas naturalization under liberalized requirements.

Even if Sections 701 and 702 could be deemed to have vested respondents with a right to citizenship, moreover, that right necessarily expired long before respondents filed their naturalization petitions. First, as we have noted, the liberalized citizenship provision expired on December 31,

1946, and any "right" to citizenship was thereby terminated for those who failed to apply by that date. Second, even if the December 31, 1946, cutoff date had been ambiguous, Congress repealed the 1940 Act in 1952 when it enacted Section 403(a)(42) of the 1952 Act, 66 Stat. 280. Finally, if those two statutory enactments were not enough, Congress amended the 1952 Act in 1961 by enacting Section 310(e) (Pub. L. No. 87-301, § 17(e), 75 Stat. 656), which provides that "any" naturalization petition filed after that date is to be heard and determined in accordance with the requirements of the 1952 Act.[28] Since respondents do not (and cannot) claim that they qualify for citizenship under the 1952 Act, they lack any existing statutory basis upon which to assert a present "right" to citizenship.

b. The court nevertheless held that Section 310(e) of the 1952 Act was not intended to "foreclose" the assertion of rights under the 1940 Act (App. 9a-10a) and that it was free "to restore the lost opportunity for citizenship that Congress offered" to respondents when it enacted Sections 701 and 702 (App. 23a). But the only way that rights can be asserted today under those expired sections is to treat respondents' belated petitions as if they had been filed while those provisions were still in effect. The court's necessary holding, therefore, was that it had equitable power to do so because the revocation of the vice consul's authority deprived respondents of an opportunity to file timely petitions.

A court, however, has no authority to ignore statutory requirements for citizenship. As this Court stated in *Fedorenko* v. *United States*, 449 U.S. 490 (1981), "there must be strict compliance with all the congressionally im-

[28] Section 310(e) was enacted specifically because, in Congress's view, " '[t]he administration of two nationality laws simultaneously is cumbersome, inefficient, and unfair to other applicants for naturalization.' " *United States* v. *Pasion*, 524 F.2d 249, 252 (9th Cir. 1975) (quoting legislative history).

posed prerequisites to the acquisition of citizenship" (*id.* at 506). If a person fails to qualify for citizenship, the Court there observed, " 'the district court has no discretion to ignore the defect and grant citizenship' " (*id.* at 517 (citation omitted)). Accord, *e.g.*, *United States* v. *Ness*, 245 U.S. 319, 324 (1917); *United States* v. *Ginsberg*, 243 U.S. 472, 474-475 (1917). Furthermore, this Court long ago held that "[a] court of equity cannot, by avowing that there is a right but no remedy known to the law, create a remedy in violation of the law, or even without the authority of law." *Rees* v. *City of Watertown*, 86 U.S. (19 Wall.) 107, 122 (1874). To the contrary, "wherever the rights or the situation of the parties are clearly defined and established by law, equity has no power to change or unsettle those rights or that situation * * *." *Magniac* v. *Thomson*, 56 U.S. (15 How.) 281, 299 (1854). The court, therefore, could not avoid the requirements of Section 701 of the 1940 Act and Section 310(e) of the 1952 Act by treating petitions filed in 1978 as if they had been filed prior to December 31, 1946.

c. Even if the court did possess equitable power to treat respondents' petitions as if they had been timely filed under the 1940 Act, *Hibi* conclusively established that this case does not warrant the exercise of that power.[29] *Hibi* held that the revocation of the vice consul's naturalization authority (as well as the failure fully to publicize the rights accorded by Sections 701 and 702) did not constitute "affirmative misconduct" that might warrant estopping the government "from denying citizenship." 414 U.S. at 8-9.

Contrary to the court of appeals' suggestion (App. 11a), this holding was not a narrow or technical one but rather was a definitive ruling that revocation of the vice consul's

[29] The facts here are in all relevant respects identical to the facts in *Hibi*. The only differences between the two cases concern the length and nature of World War II service and the degree of untimeliness of the naturalization petitions. These differences have no bearing on the equitable remedy which the court below granted to respondents.

authority did not provide a basis for equitable relief. Hibi sought to estop the government "from alleging that the filing deadline in section 701 ha[d] passed or that 8 U.S.C. § 1421(e) preclude[d his] petition." *INS* v. *Hibi,* 475 F.2d at 9. But when a litigant seeks, as did Hibi, to estop the government from enforcing a statutory provision, it is the operation of the statute that he actually seeks to prevent; it is for that reason that this Court held in *Hibi* that "the Government is not in a position identical to that of a private litigant with respect to its enforcement of laws enacted by Congress" (414 U.S. at 8). In the context of naturalization, moreover, an estoppel claim is really not addressed to Executive Branch enforcement of a legislative provision, since the Executive Branch does not rule upon a naturalization petition. The designated naturalization examiner recommends the appropriate disposition to the court, but only the court can grant or deny citizenship. See 8 U.S.C. 1446(b) and (d), 1447.

Thus, Hibi did not seek merely to estop an unfavorable recommendation by the examiner.[30] His goal was an award of citizenship from the court; to achieve that goal, he had to show that he met the statutory requirements, and he could do so only if his petition were treated as if it had been filed while Section 701 was still in effect. The equitable relief, therefore, that he ultimately sought—and the relief that every veteran seeking belated naturalization under Section 701 must necessarily seek—was the indulgence on equitable grounds of the legal fiction that a naturalization petition filed long after December 31, 1946, was constructively filed before that date.[31]

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[30] In fact, Hibi's petition was granted by the district court over the adverse recommendation of the designated examiner. See *INS* v. *Hibi,* 475 F.2d at 9.

[31] Indeed, both the veteran in *Hibi* and the court of appeals in that case recognized that "equitable estoppel" was merely the label placed upon a more general request for equitable relief. In his opposition to the government's petition for a writ of certiorari, Hibi (who was represented by the lead counsel for 14 of the 15 respondents in this case) made substantially the same contentions concerning the revocation of the vice consul's naturalization authority that respondents urged (and the court below accepted) in this case (Hibi Mem. in Opp. 3-6). He specifically disavowed any narrow or technical construction of his claim, arguing instead that "[e]quitable estoppel is only the name for a legal principle employed by the courts below to enforce [the] promise" of citizenship to alien servicemen, and that, "while the events of this case may be described in the traditional terminology of equitable estoppel, it is the overriding commands of justice and good conscience which make the difference" (*id.* at 12). Similarly, the court of appeals in *Hibi* characterized its decision as falling within a class of cases that have "invoke[d] equitable relief to permit one to obtain his rights of citizenship where those rights have been denied due to erroneous action on the part of administrative officials" (475 F.2d at 11). The Ninth Circuit's analysis in *Hibi* is thus very similar to its reasoning in the present case (see App. 21a-23a).

It follows that this Court's decision in *Hibi,* read in light of the real relief sought by Hibi and awarded him by the lower courts, must necessarily be understood as a holding that revocation of the vice consul's naturalization authority did not constitute affirmative misconduct such as to justify the granting of equitable relief.[32] Since the facts in regard to that revocation are no different here, the dissent was correct in noting that the panel, in attempting to distinguish *Hibi,* had merely "substitute[d] words for concepts" (App. 33a).[33]

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[32] This Court's recent decision in *Lyng* v. *Payne,* No. 84-1948 (June 17, 1986), is not to the contrary. That case held merely that a litigant cannot be denied his statutory remedy because the relief he seeks resembles equitable estoppel and he fails to meet the latter's more stringent requirements (slip op. 8-10). Nothing in that holding suggests that, in the absence of a statutory remedy, an equitable claim can be successively presented, based on the same asserted government misconduct, by merely requesting estoppel under another label.

[33] Indeed, it is arguable that, under the court of appeals' rationale, no decision denying equitable relief against the government on an estoppel theory would ever be conclusive, since it would be open to the

d. Finally, even if *Hibi* were not dispositive, the court's decision is erroneous for yet another reason. As the dissent noted (App. 33a), the court totally failed to balance the equities before ordering relief. Had it done so, it would have been compelled to deny relief.

This Court has made clear that equitable relief is not required as a matter of course whenever a violation of rights is found. Rather, "[i]t is always the duty of a court of equity to strike a proper balance between the needs of the plaintiff and the consequences of giving the desired relief." *Eccles* v. *Peoples Bank,* 333 U.S. 426, 431 (1948); see also *Amoco Production Co.* v. *Gambell,* No. 85-1239 (Mar. 24, 1987), slip op. 8-10; *Weinberger* v. *Romero-Barcelo,* 456 U.S. 305, 312 (1982); *Hecht Co.* v. *Bowles,* 321 U.S. 321, 329-330 (1944). Moreover, courts should be especially cautious in ordering equitable relief "where governmental action is involved," and "should not intervene unless the need for [such] relief is clear, not remote or speculative" (*Eccles,* 333 U.S. at 431).

Here, equitable considerations weigh heavily against granting respondents citizenship. In the first place, the revocation of the vice consul's naturalization authority was prompted by delicate foreign policy considerations. Even if the Attorney General misjudged his authority to consider foreign policy concerns in executing Sections 701-702, his misjudgment can hardly be characterized as egregious.[34] In addition, it is difficult to perceive any

litigant to return to court and allege that the government's conduct, while not affirmative misconduct, nonetheless denied him certain statutory "rights" and that equitable relief, *i.e.*, preventing the government from enforcing the law, was therefore appropriate. *Hibi* and this Court's other equitable estoppel cases would thereby be rendered essentially meaningless.

[34] See *Hibi,* 414 U.S. at 8-9 (Attorney General's actions did not constitute affirmative misconduct); *Santiago* v. *INS,* 526 F.2d 488, 496 (9th Cir. 1975) (en banc) (Choy, J., dissenting) (explaining *Hibi* as a

nexus between the revocation of the vice consul's authority and the alleged injury to respondents. Every respondent concedes that he did not even attempt to apply for naturalization while on active duty in the Philippines.[35] It is sheer speculation to conclude that respondents would have applied for citizenship (or would have even learned about its availability) had Vice Consul Ennis's naturalization authority not been revoked.

Moreover, respondents are seeking to revive statutory rights that expired 30 years before they filed their petitions. Granting their belated petitions would open the way to similar requests by thousands of other Filipino veterans. See note 22, *supra.*[36] Proper adjudication of

case in which the Attorney General's "decisions were so patently of the type committed to the executive branch" that, "[r]egardless of whether the Government's conduct constituted an abuse of discretion," the Supreme Court "was extremely reluctant to nullify them over 20 years later in order to relieve one individual instance of hardship"), cert. denied, 425 U.S. 971 (1976); Comment, *Estoppel Against the Government,* 1976 Utah L. Rev. 371, 381-382 (1976) (noting that the veteran in *Hibi* "could show almost no equities in his favor which required the Government to be estopped" whereas "the Government's arguments against estoppel were strong" because of the foreign policy considerations underlying the Attorney General's decision).

[35] Indeed, none of them even learned about the availability of citizenship under Sections 701-702 until after those provisions had expired. Under the examiners' findings, six of the respondents apparently became aware of the opportunity in the late 1940s, yet waited decades before filing petitions for naturalization. The other nine respondents did not learn about Sections 701-705 until the late 1970s. See pages 8-9 & note 12, *supra.* Moreover, all of the respondents had ample opportunity to apply for citizenship before Ennis's authority was revoked, since they were all on active duty in the Philippines between August 1945 and October 1945, when Ennis was naturalizing servicemen there (see App. 63a, 90a, 93a, 96a, 99a, 102a, 105a, 108a, 111a, 114a, 117a, 120a, 123a, 126a, 131a).

[36] See Note, *Estopping the Government in Immigration Cases: The Immigration Estoppel Light Remains Cautionary Yellow,* 56 Notre Dame Law. 731, 737 (1981) (footnotes omitted) (expressing opinion

such petitions would be difficult, since, in many cases, there would be virtually no way adequately to determine whether the veterans actually qualified under Sections 701-702 or whether they would have sought naturalization more than 40 years ago had an examiner been stationed in the Philippines during the period in question.

It follows that there is no demonstration here of the clear need for equitable relief which, *Eccles* teaches, is a prerequisite to such relief where governmental action is involved. The court of appeals was plainly wrong in asserting (App. 23a) that "[t]here is simply no other way to restore the lost opportunity for citizenship that Congress offered"; if Congress were to conclude that its naturalization offer was improperly thwarted by the Attorney General, it is perfectly capable of providing relief through the legislative process.[37] Since respondents' eligibility for citizenship under the 1940 Act expired more than four decades ago, their proper recourse today is not with the courts but with Congress.

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that the equities in *Hibi* favored the government because someone "who did not pursue his claim of citizenship for twenty-two years could not claim serious injustice," whereas a decision in his favor "could have resulted in successful claims by thousands of other Filipinos who were similarly situated" and could have "unduly harmed the public interest").

[37] Congress has, in fact, refused to do so on several occasions. In the first session of the 93d Congress, Congressman Burton introduced a bill (H.R. 11963, 93d Cong., 1st Sess. (1973)) which would have allowed Filipinos who served honorably in "any United States Armed Force" during World War II, along with their spouses and children, to be admitted to this country as lawful permanent residents. The same proposal was reintroduced by Congressman Anderson (H.R. 1512, 94th Cong., 1st Sess. (1975)), and by Congressman Burton (H.R. 1568, 96th Cong., 1st Sess. (1979)). More recently, Congressman Dymally introduced two bills (H.R. 4895, 98th Cong., 2d Sess. (1984) and H.R. 5875, 98th Cong., 2d Sess. (1984)) that would have extended naturalization rights to Filipino veterans notwithstanding Section 310(e) and the cutoff date of Section 701. These proposals have not generated serious interest in Congress.

CONCLUSION

The petition for a writ of certiorari should be granted.[38]
Respectfully submitted.

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JUNE 1987

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[38] In light of the controlling authority of *INS* v. *Hibi*, *supra*, as well as the governing equitable principles announced in its prior decisions, the Court may wish to consider summary reversal.

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APPENDIX

86 1992 (a)

No.

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JUN 12 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1986

IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

ANTOLIN PUNSALAN PANGILINAN, ET AL.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Nos. 80-4543, 81-5427

RE NATURALIZATION OF ANTOLIN
PUNSALAN PANGILINAN, ET AL., PETITIONERS-APPELLANTS,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
RESPONDENT-APPELLEE.

RE NATURALIZATION OF MARIO VALDERRAMA LITONJUA,
PETITIONER-APPELLANT,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
RESPONDENT-APPELLEE.

Argued Aug. 13, 1982

Submitted March 20, 1985

Aug. 11, 1986

Appeals from the United States District Court for the Northern and Southern Districts of California

---

Before SCHROEDER, FLETCHER and NORRIS, Circuit Judges.

NORRIS, Circuit Judge:

These appeals involve the naturalization petitions of 15 Filipino nationals who served honorably in the United States armed forces during World War II. All 15 veterans

claim they are entitled to American citizenship under §§ 701-705 of the Nationality Act of 1940, Pub.L. No. 76-853, 54 Stat. 1137, as amended by the Second War Powers Act § 1001, Pub.L. No. 77-507 § 1001, 56 Stat. 182 ("1940 Act"). The naturalization petitions were opposed by the Immigration and Naturalization Service (INS) and denied by the district courts. This court's jurisdiction over these appeals rests on 28 U.S.C. § 1291 (1982).

I

A

In March 1942, Congress amended the 1940 Act to provide an easier road toward American citizenship for all non-citizens who served honorably in the United States armed forces. Non-citizen servicemen were exempted from such naturalization requirements as five years of residency in the United States and proficiency in the English language. 1940 Act, § 701. As the legislative history of these amendments makes clear, Congress's intent was to provide that "if a man is ready to fight for our country we ought to give him the benefits of citizenship without the normal peacetime requirements of time, declaration of intention, and so forth. . . ." *See* Statements in Executive Session on S. 2208 (Second War Powers Act), Senate Committee on the Judiciary, January 19, 1942. More importantly, for present purposes, non-citizen servicemen were excused from the requirement that they be naturalized by courts in the United States. Congress provided that they may be naturalized outside the United States before any representative of the INS designated for that purpose by the Attorney General. 1940 Act, § 702. As Oscar Cox, General Counsel, Office for Emergency Management, explained to the Senate Committee on the Judiciary, the goal was to enable qualified servicemen to "be naturalized right

at the camps instead of having to go great distances to the particular courts that now have the power to naturalize." Statements in Executive Session on S. 2208, Second War Powers Act, Senate Committee on the Judiciary, January 19, 1942 at 29. A provision comparable to § 701 had been in effect during World War I. "The only new feature of this, from [World War I], really, is the one that they can be naturalized without having to appear before the court. . . . [The lack of such a feature in World War I] caused a great deal of difficulty." *Id.* at 30.

In August 1945, two months after the liberation of the Philippine Islands, the Immigration and Naturalization Service (INS), designated our Vice Consul in Manila, George Ennis, to naturalize military personnel under the 1940 Act. Officials of the Philippines, anticipating their independence on July 4, 1946, soon expressed concern that their newly emerging nation would suffer a manpower drain if Filipinos who served in our military forces were free to apply for American citizenship under the liberalized terms of the 1940 Act. In response to these expressions of concern from Philippine officials, the Attorney General, in October 1945, closed the window of opportunity on these Filippino servicemen by revoking Vice Consul Ennis's naturalization authority. Later that year, Congress provided that World War II veterans would have until December 31, 1946 to petition for naturalization under the relaxed wartime standards of the 1940 Act. This extension, however, was of little value to Filipino war veterans because the Attorney General did not restore naturalization authority in the Philippines until August 1946—four months before the statutory cut-off date.

The Attorney General's revocation of Mr. Ennis's naturalization authority in 1945 has spawned extensive litigation over the rights of Filipinos who served in our military forces in World War II. *See, e.g., INS v. Hibi*, 414 U.S. 5, 94 S.Ct. 19, 38 L.Ed.2d 7 (1973); *Mendoza v.*

United States, 672 F.2d 1320 (9th Cir.1982), *vacated and remanded*, 464 U.S. 154, 104 S.Ct. 568, 78 L.Ed.2d 379 (1984); *Olegario v. United States*, 629 F.2d 204 (2d Cir.1980), *cert. denied*, 450 U.S. 980, 101 S.Ct. 1513, 67 L.Ed.2d 814 (1981); *In re Naturalization of 68 Filipino War Veterans*, 406 F.Supp. 931 (N.D.Cal.1975). Because the background and history of this litigation is accurately chronicled in *Olegario*, 629 F.2d at 207-16, we need not repeat it in detail. Instead, we turn directly to the naturalization petitions of the 15 Filipino veterans now before us.

B

Case No. 80-4543 involves the consolidated appeals of 14 Filipino veterans whose naturalization petitions were denied by the district court on the ground that they were filed after the December 31, 1946 statutory deadline. The INS has stipulated that all 14 qualify as Category II veterans under the classification system adopted by Judge Renfrew in *In re Naturalization of 68 Filipino War Veterans*, 406 F.Supp. 931 (N.D.Cal.1975) (*68 Filipinos*). Judge Renfrew divided the 68 petitioners involved into three categories. Category I consisted of those veterans who had taken some affirmative steps to be naturalized before the December 31, 1946 statutory cut-off date.[1] Category II consisted of Filipino veterans who were eligible for naturalization under the 1940 Act and present in the Philippines during the period from October 1945 to August 1946, but who had not taken affirmative steps to be naturalized before December 31, 1946. Judge Renfrew

[1] Judge Renfrew conferred citizenship on all Category I veterans on the ground that they had been victims of "affirmative misconduct" because the INS had actively discouraged them from seeking naturalization while they were stationed in the Philippines. *Id.* at 938-39.

held that Category II veterans were entitled to citizenship because the Attorney General's revocation of Vice Consul Ennis's naturalization authority deprived the Filipino veterans equal protection of the laws as guaranteed by the Due Process Clause of the Fifth Amendment.[2] Finally, Category III veterans were those who could not prove that they had been eligible for naturalization under the 1940 Act. *Id.* at 936-37, 951.

Case No. 81-5427, involves a single petitioner, Mario Valderrama Litonjua whose petition for naturalization was also denied by the district court on the ground that it was filed after the December 31, 1946 statutory deadline. In contrast to its position in Case No. 80-4543, the INS disputes Litonjua's claim that he qualifies as a Category II veteran. Litonjua enlisted in the United States Navy in 1941 and became a prisoner of war in 1942. After his release from a Japanese prison camp in early 1945, he rejoined his unit in the Philippines where he remained on active duty until he was honorably discharged on April 10, 1946. Thus, Litonjua was in the Philippines and eligible to

[2] Judge Renfrew rejected the government's argument that the Due Process clause was not applicable to the Filipino war veterans because they were not citizens. Upon reviewing the Philippine Independence Act, and the Immigration and Nationality Act, he concluded that Filipinos were nationals of the United States until July 4, 1946, when the Islands became fully independent. 406 F.Supp. at 941. Furthermore, according to Judge Renfrew, the Philippine Independence Act "evidence[d] an unmistakeable [*sic*] Congressional intent to preserve for Filipinos basic civil rights." *Id.* at 942. Judge Renfrew thus observed that "it would be anomalous" to afford less constitutional protection to Filipino war veteran[s] than the extensive protections "enjoyed by [transients] of foreign nationality," 406 F.Supp. at 950, and held that their rights were coextensive with those of other non-citizen residents of the United States. *Id.* at 949-50. In his view the government failed to show a compelling state interest justifying the withdrawal of naturalization authority which discriminated against Filipinos, an inherently suspect class. *Id.*

be naturalized under the 1940 Act during the month period when the Attorney General withheld naturalization authority from the Philippines.

The INS did not challenge Litonjua's status as a Category II veteran in its briefs. It asserted for the first time in oral argument that Litonjua does not qualify as a Category II veteran because he sought naturalization in Seattle, Washington after his discharge.[3] We reject this argument because we fail to see any valid reason for denying Litonjua Category II status simply because he tried to apply for naturalization in this country after his discharge. We hold that Litonjua fits into Category II because he was an eligible serviceman stationed in the Philippines during the nine-month period when the Attorney General denied Filipinos the opportunity to seek naturalization under the 1940 Act. *See 68 Filipinos*, 406 F.Supp. at 936-37.

In sum, Litonjua, Pangilinan and the other 13 petitioners whose appeals are before us are Category II veterans. They were stationed in the Philippines during the nine-month period when there was no naturalization examiner in the Philippines, and they would have qualified for American citizenship under the 1940 Act had they filed naturalization petitions before the statutory cut-off date of December 31, 1946. Petitioners make two arguments in support of their claim that they are entitled to citizenship notwithstanding the untimeliness of their petitions:[4] (1) that the Attorney General exceeded his authority and contravened the will of Congress when he revoked Vice Consul Ennis's naturalization authority and denied the benefits of the 1940 Act to servicemen stationed in the Philippines for nine months; and (2) that, as ruled by Judge Renfrew in *68 Filipinos*, the Attorney General's action denied petitioners equal protection of the laws as guaranteed by the Due Process Clause of the Fifth Amendment. Both arguments are disputed by the INS. In addition, the INS raises four threshold barriers to petitioners' citizenship claims: (1) the Attorney General's order withdrawing naturalization authority from the Philippines raises a political question not subject to judicial review; (2) petitioners are barred from seeking naturalization because of section 310(e) of the Naturalization Act of 1952, 75 Stat. 656, 8 U.S.C. § 1421(e) (1982); (3) the petitions are barred by laches; and (4) petitioners' claims are foreclosed by *INS v. Hibi*, 414 U.S. 5, 94 S.Ct. 19, 38 L.Ed.2d 7 (1973). We will address the INS's threshold points before considering petitioners' statutory and constitutional arguments.[5]

[3] Litonjua responds that his attempt to be naturalized in Seattle qualifies him for Category I status. Because we hold he is entitled to citizenship as a Category II veteran, we need not reach his claim to Category I status.

[4] Petitioners originally advanced a third argument in support of their claims to citizenship: that the judgment in *68 Filipinos* collaterally estops the government from denying citizenship to Category II veterans. Relying upon *Mendoza v. United States*, 672 F.2d 1320 (9th Cir. 1982), *vacated and remanded*, 464 U.S. 154, 104 S.Ct. 568, 78 L.Ed.2d 379 (1984), we upheld petitioners' collateral estoppel claim. *Barretto v. United States*, 694 F.2d 603 (9th Cir. 1982). After the Supreme Court reversed *Mendoza* on the collateral estoppel ground, it vacated and remanded the *Litonjua* and *Pangilinan* cases to us for further consideration. *INS v. Litonjua*, 465 U.S. 1001, 104 S.Ct. 990, 79 L.Ed.2d 224 (1984).

[5] All questions presented by these appeals are pure questions of law reviewable *de novo*. *United States v. McConney*, 728 F.2d 1195, 1200 (9th Cir. 1984), *cert. denied*, ____ U.S. ____, 105 S.Ct. 101, 83 L.Ed.2d 46 (1985).

II

A

The INS's contention that the claims of Filipino war veterans to citizenship under the 1940 Act are barred by the political question doctrine has been raised in several

prior cases. The INS relies upon an unpublished district court decision. *See In re Naturalization Petition of Inton*, No. SA-79-CA-284 (E.D.Tex. July 3, 1980). In contrast, both Judge Renfrew in *68 Filipinos*, 406 F.Supp. at 943-48, and the Second Circuit in *Olegario*, 629 F.2d at 216-19, held that the claims of Filipino war veterans based upon the Attorney General's revocation of Vice Consul Ennis's naturalization authority are justiciable.

We find the reasoning of both Judge Renfrew and the Second Circuit to be persuasive. In rejecting the government's political question argument, Judge Renfrew applied the six-pronged test of *Baker v. Carr*, 369 U.S. 186, 217, 82 S.Ct. 691, 710, 7 L.Ed.2d 663 (1962). Noting that not all cases touching upon foreign affairs are nonjusticiable, 406 F.Supp. at 945, he reasoned that the judicial standards of equal protection and due process are well-developed; that Congress had established the relevant policy in the 1940 Act, leaving no "initial policy determination of a kind clearly for nonjudicial discretion," *id.* at 946 (quoting *Baker v. Carr*, 369 U.S. at 217, 82 S.Ct. at 710); that because it was unlikely that the foreign policy of the United States would be affected by the court's consideration of the merits of the case, there was no special need for unquestioning adherence to a political decision already made, *id.* at 947; and that there was little likelihood that "multifarious pronouncements by various departments on one question" would embarrass the United States. *Id.* at 945-47.

In *Olegario*, the Second Circuit agreed with Judge Renfrew's analysis. 629 F.2d at 216-19. So do we.[6] As the

[6] We also agree with the Second Circuit's rejection of an INS argument raised that in applying the political question doctrine, courts must "assume a historical perspective and determine whether [petitioner's] claim would have been entertained in 1945". 629 F.2d at 218. Rather, courts apply the doctrine to the political conditions existing at the time the case is litigated. *Id.*

Supreme Court said in *Baker v. Carr*, "[t]he doctrine of which we treat is one of 'political questions,' not one of 'political cases.' The courts cannot reject as 'no law suit,' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority." 369 U.S. at 217, 82 S.Ct. at 710. At their core, the Filipino war veterans' claims to citizenship raise questions of individual rights allegedly denied through unauthorized and unconstitutional action by the executive branch. We hold that the questions raised by petitioners are justiciable, not "political."

B

The INS's second threshold contention is that the citizenship claims of the Filipino war veterans are barred by section 310(e) of the 1952 Immigration and Nationality Act, 75 Stat. 656, 8 U.S.C. § 1421(e) (1961). Section 310(e) was enacted in 1961 in response to several judicial decisions that had broadly construed the savings clause of the Immigration and Nationality Act of 1952 § 405(b), Pub.L. No. 82-414, 66 Stat. 242, to permit naturalization petitions to be filed under either the 1940 Act or the 1952 Act. *See* 1961 U.S.Code Cong & Ad.News, at 2950, 2981-82. Section 310(e) explicitly required that all naturalization petitions be filed under the 1952 Act, thereby closing the option of petitioning under the less stringent requirements of the 1940 Act. *See Olegario*, 629 F.2d at 211-12.

The INS argues that Section 310(e) bars Filipino war veterans from applying for naturalization under Section 701 of the 1940 Act. We disagree. While it is true that in enacting section 310(e) in 1961, Congress clearly intended to foreclose future petitions under the 1940 Act, there is no basis in logic or precedent for concluding that Congress intended to foreclose Filipino war veterans from litigating claims that the executive branch had denied them statutory

and constitutional rights in closing off their opportunity to petition for naturalization under the 1940 Act. As the Second Circuit said in also rejecting the INS's section 310(e) argument, "[w]hile Congress may repeal a statute, or amend it in response to judicial interpretations, such legislation does not automatically cut off the rights of those persons who are unconstitutionally deprived of statutory benefits to which they were previously entitled." *Olegario*, 629 F.2d at 220.[7]

C.

The INS's argument that the war veterans' claims are barred by laches is easily disposed of. Once again, we agree with the Second Circuit in *Olegario* that the government has made no showing that it has been prejudiced by any lack of diligence on the part of the veterans in pursuing their claims. *Id.* at 221-22.

D

The INS's fourth and final threshold argument is that judicial relief in these cases is foreclosed by the Supreme Court's decision in *INS v. Hibi*, 414 U.S. 5, 94 S.Ct. 19, 38 L.Ed.2d 7 (1973). Once again, we join both Judge Renfrew in *68 Filipinos*, 406 F.Supp. at 942-43, and the Second Circut in *Olegario*, 629 F.2d at 221, in rejecting this argument. In *Hibi*, the Court held that the government's

[7] We also agree with the Second Circuit that nothing in this Circuit's opinion in *United States v. Pasion*, 524 F.2d 249 (9th Cir. 1975), precludes our granting naturalization under the 1940 Act. *See Olegario*, 629 F.2d at 222. Petitioner in that case made no allegation that he had been denied the opportunity to apply under the 1940 Act because of unauthorized or unconstitutional action by the executive branch. Pasion merely claimed that he qualified for naturalization under the terms of the 1940 Act, a claim that after September 26, 1961, was clearly foreclosed by section 310(e). 524 F.2d at 252.

failure to advise a Filipino war veteran of his rights under the 1940 Act and to station a naturalization officer in the Philippines during 1945-46 did not rise to the level of affirmative misconduct sufficient to invoke the doctrine of equitable estoppel against the United States. In the cases now before us, however, petitioners do not rely upon the doctrine of equitable estoppel. Rather they raise statutory and constitutional arguments neither presented to nor addressed by the Supreme Court in *Hibi*. Accordingly the doctrine of *stare decisis* is inapplicable.

III

We now address the merits of petitioners' statutory claim: that the Attorney General acted in excess of his authority and in contravention of the will of Congress when he withheld naturalization authority from the Philippines for the nine-month period from October 1945 to August 1946.

A

In enacting the Second War Powers Act of 1942, Congress clearly intended to provide for overseas naturalization of non-citizen military personnel under the 1940 Act. See pages [2a-3a] *supra*. It is equally clear that Congress intended to afford the Attorney General a measure of authority in implementing this statutory mandate. Section 705 of the 1940 Act provides that "[t]he Commissioner, with the approval of the Attorney General, shall prescribe and furnish such forms, and shall make such rules and regulations as may be necessary to carry into effect the provisions of this Act."

The INS argues that the authority granted to the Attorney General by Section 705 includes the discretion to

decide when and where to make the benefits of the 1940 Act available to eligible servicemen:

> Surely the 1940 Act did not require the Commissioner and the Attorney General to naturalize every alien eligible under Sections 701 and 702 of the 1940 Act, or require that a naturalization examiner be stationed in each and every area where an eligible serviceman may be found. Congress in passing Sections 701 and 702 of the 1940 Act surely did not mean to require the Commissioner and the Attorney General to post naturalization examiners in the Philippines during the Japanese occupation, even though there were eligible aliens present in the Philippines during that time. While the rotation system—whereby naturalization examiners traveled from post-to-post, spending only a short period of time in each—adopted by the Commissioner and the Attorney General undoubtedly prevented some qualified aliens from applying for naturalization, the control and deployment of the naturalization examiners was a proper exercise of executive power, and did not contravene Sections 701 and 702 of the 1940 Act. This is also true with respect to stationing examiners in the Philippines.

Brief for Appellee at 12.

We are astonished that the INS, in resisting citizenship for these Filipino war veterans, would resort to the argument that Congress surely did not intend to send civilian naturalization examiners into enemy-held territory. Of course Congress could not have so intended. But here we are dealing with post-war Manila, not enemy-held territory. The issue before us is whether Congress intended to authorize the Attorney General to deny a class of eligible servicemen—in this case Filipinos—the benefits of the Act solely on the basis of domestic concerns voiced by prospective members of the government of the soon-to-be-independent Philippines. The INS's argument about

naturalization examiners in the Philippines during the Japanese occupation is patently irrelevant.

We also find the INS's argument about the Attorney General's discretion to rotate naturalization officers "from post-to-post" to be wide of the mark. No one could seriously contend that Congress mandated the Attorney General to make naturalization examiners continuously available to alien servicemen wherever they may be stationed. But that is beside the point. Manila was hardly a military outpost, and the Attorney General did not revoke Vice Consul Ennis's naturalization authority as part of a program of rotating naturalization examiners from post to post. Nor did he revoke that authority because of the unavailability of American civilians such as George Ennis to serve as naturalization examiners in Manila. Indeed, there is no indication that Mr. Ennis stopped serving as Vice Consul in Manila when his naturalization authority was revoked. Hence we reject the INS's attempt to justify the withdrawal of naturalization authority from the Philippines as though it were an exercise in rotating limited personnel to different military posts.

B

The second prong of the INS's statutory interpretation argument is based upon the inherent powers of the executive branch in the field of foreign affairs. While acknowledging that the statute and the legislative history are silent on the issue, the INS argues that Congress implicitly delegated to the Attorney General the discretion to selectively deny the benefits of the 1940 Act on foreign policy grounds.[8] In essence, the INS argues that when

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[8] The INS does not make the corollary argument that the executive had the inherent power to revoke Vice Consul Ennis's authority for foreign policy reasons independent of the statutory authority granted to the Attorney General by § 705.

Congress in 1942 offered naturalization on generous terms to aliens who served in our military forces, the offer carried an implied condition: it could be unilaterally revoked by the Attorney General in response to post-war domestic concerns expressed by foreign officials.

Beyond reciting the platitude that the executive has broad authority in the field of foreign affairs, *see, e.g, Chicago & Southern Airlines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103, 68 S.Ct. 431, 92 L.Ed. 568 (1948); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 57 S.Ct. 216, 81 L.Ed. 255 (1936), the INS fails to develop the argument that it was the implied will of Congress to cloak the Attorney General with inherent authority to deny Filipino servicemen the benefits of the 1940 Act in response to the manpower concerns expressed by Philippine officials.[9] The INS fails, for example, to apply the analysis of *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153 (1952), to the decision of the Attorney General overriding the will of Congress that alien servicemen who qualified under the Act be "naturalized right at the camps" overseas. See pages [2a-3a], *supra*.

[9] The INS relies upon *Haig v. Agee*, 453 U.S. 280, 101 S.Ct. 2766, 69 L.Ed.2d 640 (1981), and *Dames & Moore v. Regan*, 453 U.S. 654, 101 S.Ct. 2972, 69 L.Ed.2d 918 (1981), a reliance that is misplaced. In *Agee*, the issue was whether the Secretary of State exceeded his powers by revoking Agee's passport on the ground that Agee's conduct abroad was endangering national security and interfering with the nation's foreign relations. Although the Passport Act of 1926 did not expressly authorize the Secretary's action, the Court upheld the revocation of Agee's passport because the Court found a long history of authority to revoke passports on national security grounds. A similar pattern of congressional acquiescence was found in *Dames & Moore*, wherein the Supreme Court upheld an administration order which, among other things, suspended claims of American citizens then pending in the federal courts in suits against the Government of Iran. Although Congress had not expressly authorized such an order, the Court noted that Congress had implicitly approved it because of its acquiescence in a long-standing practice of the executive to settle claims between American citizens and foreign governments. In contrast to *Agee* and *Dames & Moore*, there has been no pattern of congressional acquiescence in the Attorney General's refusal to carry out a benevolent naturalization law on the basis of domestic concerns voiced by members of a nascent foreign government.

In *Youngstown*, Justice Jackson provided a tripartite analytical framework for evaluating claims of executive authority. The authority of the executive, he wrote, would vary according to the nature and extent of Congressional action and authority in the area. *Id.* 343 U.S. at 635, 72 S.Ct. at 870 (Jackson, J., concurring). Thus, executive authority is at its zenith and the executive "may be said . . . to personify the federal sovereignty" when the executive action is either expressly or implicitly authorized by Congress. *Id.* at 635-36, 72 S.Ct. at 870 (Jackson, J., concurring); *see, e.g., Dames & Moore v. Regan*, 453 U.S. 654, 668-69, 101 S.Ct. 2972, 2980-81, 69 L.Ed.2d 918 (1981) (executive authority to suspend claims against Iran pending in federal courts upheld because of Congressional acquiescence in settled practice of executive to settle claims between American citizens and foreign governments). Conversely,

> When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional power of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.

343 U.S. at 637-38, 72 S.Ct. at 871 (Jackson, J., concurring).

In the instant cases, there is little room for doubt that the Attorney General's revocation of Vice Consul Ennis's authority was "incompatible with the expressed will of Congress." *Id; see INS v. Miranda,* 459 U.S. 14, 18, 103 S.Ct. 281, 283, 74 L.Ed.2d 12 (1982) (the Attorney General's "error was clear" when he revoked Ennis's authority in 1945). In clear and unambiguous terms Congress provided (1) that non-citizens (Filipinos, in this case) who served honorably in the military forces of the United States during World War II may be naturalized if they met liberalized standards, § 701; (2) that any such person serving abroad may be naturalized outside of the United States, § 702; (3) that the petitions of such persons serving abroad "*shall be made and . . . filed with, a representative of the Immigration and Naturalization Service designated by the Commissioner,*" *id.* (emphasis added); and (4) that the "Commissioner, with the approval of the Attorney General, *shall* prescribe and furnish such forms, and *shall* make such rules and regulations as may be *necessary to carry into effect* the provisions of this Act." § 705 (emphasis added).

Thus the language of the statute is clear. It contains no express or implied delegation of authority to the Attorney General[10] to deny the benefits of the Act to eligible aliens for any reason. Congress used language that was mandatory, not discretionary. It spoke, for example, of representatives "designated" to process naturalization petitions overseas, not representatives who "may be designated." § 702. It mandated that the Commissioner, with the approval of the Attorney General, "shall" (not may) prescribe and furnish such forms, and "shall" (not may) make such rules and regulations as may be necessary "to carry into effect" the provisions of this Act. § 705.

[10] Except where otherwise indicated, the term "Attorney General" is used throughout this opinion to refer to both the Attorney General and the Commissioner of the Immigration and Naturalization Service.

Thus, in Justice Jackson's language, the Attorney General's withdrawal of naturalization authority from the Philippines was "incompatible with the expressed will of Congress" and executive authority was, therefore, "at its lowest ebb." *Youngstown,* 343 U.S. at 637-38, 72 S.Ct. at 871 (Jackson, J. concurring). Accordingly, we reject the executive branch's claim that its inherent power over foreign affairs is so pervasive that we should disregard the expressed will of Congress and find an implied intent to defer to the Attorney General's judgment that benefits under the Act should be withheld from Filipinos in response to postwar manpower concerns expressed by Philippine officials.

We are especially reluctant to find an implied congressional intent to delegate such wide discretion to the executive branch in the field of naturalization. Under the Constitution, U.S. Const. Art. I, § 8, cl. 4, the power of Congress over immigration and naturalization is virtually plenary. *See Fiallo v. Bell,* 430 U.S. 787, 792, 97 S.Ct. 1473, 1478, 52 L.Ed.2d 50 (1977) ("over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens"). Although Congress has at times demonstrated a willingness to delegate broad discretionary authority to the Attorney General in the field of immigration and naturalization,[11] it did not do so in § 705 of the 1940 Act. Further, in arguing that the revocation of Vice Consul Ennis's naturalization authority implicated concerns of diplomacy best left to the discretion of the executive,[12] the INS ignores the fact that in

[11] *See, e.g.,* 8 U.S.C. § 1158(a) (1982) (Attorney General given discretion to deny asylum even when an alien has established statutory eligibility).

[12] We need not decide whether Congress would have intended to defer to the foreign policy judgment of the President, as distinguished from the Attorney General. *See Hampton v. Mow Sun Wong,* 426 U.S. 88, 114, 96 S.Ct. 1895, 1910, 48 L.Ed.2d 495 (1975) (recognizing

1945 the Philippines was a territory of the United States and that the Constitution expressly delegated power to regulate American territory to the Congress, not to the executive branch. U.S. Const., Art. IV, § 3 cl. 2. Moreover, the imperative cited by the INS—avoiding a drain on Philippine manpower—is belied by the fact that during the time the Attorney General withheld naturalization authority from the Philippines, Congress was recruiting, with "the approval of" Philippine authorities, 50,000 Philippine residents into the postwar United States occupation forces. Act of October 6, 1945, Pub.L. 79-190, Sec. 14, 59 Stat. 543.[13]

Finally, it is hard to believe that Congress intended to license the Attorney General to deny the benefits of the 1940 Act to Filipinos as a class.[14] The legislative history of the Second War Powers Act of 1942 demonstrates that Congress intended to assure "that aliens honorably serving in our armed forces during the present war may acquire citizenship *regardless of race*, age, length of service, and education." *See* S.Rep. Written Statement of Attorney

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the distinction between the exercise of the executive power by the President and by other members of the executive branch). While we do not question the authority of the President to exercise his inherent powers in foreign affairs through executive agencies other than the State Department, the INS does not contend that anyone with responsibility for foreign affairs participated in the Attorney General's decision to revoke Vice Consul Ennis' naturalization authority.

[13] Those enlistments, petitioners cogently argue, would constitute as much of a drain on Philippine manpower as would the naturalization of Filipinos who served in World War II.

[14] It is particularly hard to believe that Congress would have tolerated discrimination against Filipinos. In 1942, when Congress offered aliens the opportunity for citizenship in exchange for military service, the Philippines was not only strategically located in the heart of the Pacific Theatre, it also provided a reservoir of manpower far greater than all other United States territories and possessions com-

General Biddle on the Second War Powers Bill (emphasis added). Thus the Attorney General was expected to carry out the mandate of Congress in an even-handed, nondiscriminatory manner. That the Attorney General failed to do so when he stripped the Philippines of naturalization authority cannot be denied. Indeed, Judge Renfrew decided that the Attorney General's action was so discriminatory that it deprived eligible Filipinos of the equal protection of the laws guaranteed by the Fifth Amendment of the Constitution. *68 Filipinos,* 406 F.Supp. at 948-49.

In sum, we believe that the Congress of 1942, preoccupied with the war effort and our nation's honor, would have been appalled at the notion that its generous offer of citizenship for alien servicemen was freely terminable at the discretion of the Attorney General, especially on a discriminatory basis. As the Supreme Court has said in a similar context,

> [We] hesitate to impute to Congress, when in 1952 it made a passport necessary for foreign travel and left its issuance to the discretion of the Secretary of State, a purpose to give him unbridled discretion to grant or withhold a passport from a citizen for any substantive reason he may choose. . . . [W]hen a precious right is

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bined. Our territories and possessions, and their respective populations in 1940, were as follows:

Commonwealth of the Philippines	–	16,356,000
Puerto Rico	–	1,869,254
Hawaii	–	423,330
Alaska	–	72,524
Panama Canal Zone	–	51,827
Virgin Islands	–	24,889
Guam	–	22,290
Samoa	–	12,908

Statistical Abstract for 1940.

granted, we will construe narrowly all delegated powers that curtail or dilute it."

Kent v. Dulles, 357 U.S. 116, 128-29, 78 S.Ct. 1113, 1119-20, 2 L.Ed.2d 1204 (1958). Clearly the right to citizenship is even more precious than the right to a passport. Thus we cannot accept the INS's argument that we should read into the 1940 Act a broad grant of implied authority to curtail the benefits of the Act to eligible servicemen. Because a "precious right" was granted by the 1940 Act, we must construe the authority granted to the Attorney General narrowly. *Id.*

In rejecting the INS's expansive interpretation of the 1940 Act, we not only vindicate the right to citizenship claimed by the Filipino war veterans who qualified for citizenship under the Act; we also avoid deciding this substantial constitutional question. We thus observe the teaching of the Supreme Court that a statute is "to be construed, if such a construction is possible, to avoid raising doubts about its constitutionality." *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 780, 101 S.Ct. 2142, 2147, 68 L.Ed.2d 612 (1980). Judge Renfrew's decision in *68 Filipinos* that the Attorney General's action denied Filipino war veterans the equal protection of the laws in violation of the Fifth Amendment attests to the seriousness of the constitutional problem we would confront if we accepted the INS's view of the Attorney General's authority under the statute.

C

We recognize that our decision that the Attorney General exceeded his statutory authority and thwarted the will of Congress when he revoked Vice Consul Ennis's naturalization authority brings us into conflict with the Second Circuit in *Olegario*. While acknowledging that the Attorney General "did not have unbridled discretion" in

implementing the 1940 Act, 629 F.2d at 226, and that the "unilateral" withdrawal of naturalization authority from the Philippines temporarily frustrated Congress's immediate objective in extending its offer of citizenship to members of our military forces, *id.*, the Second Circuit found an "implicit intent" on the part of Congress to grant the Attorney General authority to "consider the foreign affairs ramifications of a particular mode of enforcement and to suspend implementation to avoid a confrontation." *Id.* With all respect, we find the Second Circuit's analysis in *Olegario* to be unpersuasive. Moreover, the Second Circuit decided *Olegario* before the Supreme Court stated in *INS v. Miranda*, 459 U.S. 14, 103 S.Ct. 281 74 L.Ed.2d 12 (1982), that the Attorney General's "error was clear" when he revoked Vice Consul Ennis's naturalization authority in 1945. *Id.* at 18, 103 S.Ct. at 283.[15]

CONCLUSION

We hold that, in creating "the rather anomalous situation that while we recognize in law the legal right of these persons to the benefits under the [1940] Act we have, from an administrative standpoint, made it impossible for such persons to acquire these benefits,"[16] the Attorney General

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[15] In *Miranda*, which was decided after *Olegario*, the Court held that the INS' unexplained 18-month delay in processing a visa application was not affirmative misconduct that estopped the INS from denying the application. The Court found that the 18-month delay in processing the visa application provided a weaker case of affirmative misconduct than the Attorney General's revocation of Ennis' naturalization authority because "[u]nlike *Hibi, where the Government's error was clear*, the evidence that the Government failed to fulfill its duty in this case [*Miranda*] is at best questionable." *Miranda*, 459 U.S. at 18, 103 S.Ct. at 283 (emphasis added).

[16] Memorandum from Edward J. Shaughnessy, Special Assistant to the Commissioner of the INS, to Ugo Carusi, Commissioner, INS (October 19, 1945). *See Olegario*, 629 F.2d at 210; *68 Filipinos*, 406 F.Supp. at 936 n.6.

acted beyond the bounds of his authority to "carry into effect the provisions of [the 1940 Act]." 1940 Act, § 705. The remaining question before us is whether the federal judiciary has the authority to remedy the Attorney General's transgression by granting the relief sought by the Filipino war veterans—American citizenship notwithstanding the untimeliness of their naturalization petitions under the 1940 Act.[17]

In reviewing naturalization petitions, federal courts sit as courts of equity. *Fedorenko v. United States,* 449 U.S. 490, 516-18, 101 S.Ct. 737, 752-53, 66 L.Ed.2d 686 (1980). When reviewing agency action, a federal court has broad remedial powers and may "adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action." *Legal Aid Society of Alameda County v. Brennan,* 608 F.2d 1319, 1342 (9th Cir. 1979) (quoting *Ford Motor Co. v. NLRB,* 305 U.S. 364, 373, 59 S.Ct. 301, 307, 83 L.Ed. 221 (1939)); *see also Harper v. Levi,* 520 F.2d 53, 60 (9th [*sic*] [D.C.] Cir. 1975) ("courts are empowered to rectify agency action erroneously taken. . . ."). "The essence of equity jurisidiction," as Justice Douglas wrote,

> has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims.

Hecht Co. v. Bowles, 321 U.S. 321, 329-30, 64 S.Ct. 587, 591-92, 88 L.Ed. 754 (1944); *see also Lemon v. Kurtzman,*

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[17] As Category II veterans, all 15 appellants in the instant cases were stationed in the Philippines during the nine-month period that naturalization authority was withdrawn, and all qualified for citizenship under the 1940 Act. See pages [4a-5a], *supra.*

411 U.S. 192, 200-01, 93 S.Ct. 1463, 1469, 36 L.Ed.2d 151 (1972) [*sic* (1973)] ("equitable remedies are a special blend of what is necessary, what is fair, and what is workable. . . . In equity, as nowhere else, courts eschew rigid absolutes and look to the practical realities and necessities inescapably involved in reconciling competing interests. . . ."); *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 12, 91 S.Ct. 1267, 1274, 28 L.Ed.2d 554 (1970) ("Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies."); *Graves v. Romney,* 502 F.2d 1062, 1064 (8th Cir. 1974) ("The goal of equitable relief . . . is to restore the plaintiff to the enjoyment of the right which has been interfered with to the fullest extent possible . . . ."), *cert. denied,* 420 U.S. 963, 95 S.Ct. 1354, 43 L.Ed.2d 440 (1975).

Notwithstanding these deep-rooted precepts of equity, the INS argues that we have no authority to redress the error of the Attorney General in withdrawing naturalization authority from the Philippines by granting the naturalization petitions of war veterans who were stationed there at the time. The INS would have us limit our equitable remedies to the restoration of naturalization authority in the Philippines, which would be an empty gesture at this late date. We reject this invitation to render impotent the federal judiciary's traditional powers of equity. Rather we grant the only effective remedy available to "rectify the agency action taken," *Harper v. Levi,* 520 F.2d at 60: granting citizenship to the 15 Filipino war veterans whose naturalization petitions are now before us. There is simply no other way to restore the lost opportunity for citizenship that Congress offered them as a just reward for their military service in World War II.

As Judge Renfrew wrote in *68 Filipinos:*

> [T]he Court cannot ignore, nor will the American public forget, the heroic sacrifices made by these and other Filipinos during World War II. Their courage and valor at Corregidor, during the Bataan death march, and throughout the Japanese occupation of the Philippines Islands stand as the finest examples of the dedication of free men opposing and resisting tyranny imposed upon them by an outside belligerent force. Petitioners' love of freedom and dedicated defense of this country during time of war truly show that "[l]oyalty is a matter of the heart and mind, not of race, creed, or color." *Ex parte Endo*, 323 U.S. 283, 302, 65 S.Ct. 208, 218, 89 L.Ed. 243 (1944).

68 Filipinos, 406 F. Supp. at 951. The district court orders denying these petitions for naturalization are reversed. The cases are remanded for the entry of orders naturalizing the 15 Filipino war veterans whose petitions are before us in these appeals.

REVERSED and REMANDED.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 80-4543
DC #251849 WWS

RE NATURALIZATION OF ANTOLIN PUNSALAN PANGILNAN, [*sic*], #251849; PANFILO JABLDE [*sic*], #257890; FIDEL ZOSIMO USI CANILAO, #257893; ANTONIO PATDO TANTAY, #257939; ARCADIO REVILLA NEPOMUCENO, #257943; DIONISIO VALLEJOS LUCAS, #259187; OLIVER JUAN POSADAS, #259822; VINCENTE [*sic*] MIRANDA BELIZARIO, #267623; RODOLFO DE JESUS BATAC, #267645; PEDRO DUMLAO PONCIANO, #267654; CESAR JOCSON ASCALON, #268252; WINIFREDO PABLEO BELLO, #268438; BONIFACIO LEONCIO ZARCAL, #268448; BENJAMIN NATIVADAD BONUS, #268479; PETITIONERS-APPELLANTS,

v.

IMMIGRATION & NATURALIZATION SERVICE,
DEFENDANT-APPELLEE.

[August 11, 1986]

APPEAL from the United States District Court for the Northern District of California.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed and remanded.

A TRUE COPY
ATTEST FEB 25 1987
CATHY A. CATTERSON
Clerk of Court
by: Oscar Tagle
Deputy Clerk

Filed and entered August 11, 1986

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 81-5427
D.C. No. 23358

IN THE MATTER OF PETITION OF MARIO VALDERRAMA LITONJUA, PETITIONER/APPELLANT,

v.

IMMIGRATION & NATURALIZATION SERVICE, RESPONDENT/APPELLEE.

[August 11, 1986]

APPEAL from the United States District Court for the Southern District of California.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed and remanded.

Filed and entered August 11, 1986

APPENDIX D

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Nos. 80-4543, 81-5427

RE NATURALIZATION OF ANTOLIN
PUNSALAN PANGILINAN, ET AL., PETITIONERS-APPELLANTS,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
RESPONDENT-APPELLEE.

RE NATURALIZATION OF MARIO VALDERRAMA LITONJUA,
PETITIONER-APPELLANT,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
RESPONDENT-APPELLEE.

Feb. 13, 1987

Before SCHROEDER, FLETCHER and NORRIS, Circuit Judges.

ORDER

The panel, as constituted above, has unanimously voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing and upon the vote of the eligible judges in active service, a majority failed to vote for en banc rehearing.

The petition for rehearing is DENIED, and the suggestion for a rehearing en banc is REJECTED.

KOZINSKI, Circuit Judge, with whom Circuit Judges SNEED, KENNEDY, ANDERSON, HALL, WIGGINS, THOMPSON and O'SCANNLAIN join, dissenting from the order rejecting the suggestion for rehearing en banc.

No doubt moved by what it sees as an injustice, the panel in this case has granted United States citizenship to the petitioners under a statute that expired over 40 years ago. While the panel may have acted from the noblest of motives, its opinion disregards the clear teachings of the Supreme Court in *INS v. Hibi*, 414 U.S. 5, 94 S.Ct. 19, 38 L.Ed.2d 7 (1973), and on a separate issue creates a square and irreconcilable conflict with the opinion of the Second Circuit in *Olegario v. United States*, 629 F.2d 204 (2d Cir.1980), *cert. denied*, 450 U.S. 980, 101 S.Ct. 1513, 67 L.Ed.2d 814 (1981). It also misconstrues the function of the federal courts in naturalization proceedings, seriously overstates their equity power and unsettles established law as to congressionally mandated time limitations. The court today bypasses the opportunity to correct this constellation of errors.

I.

Petitioners are Filipino nationals who served in the armed forces of the United States during World War II. Pursuant to the Nationality Act of 1940, Pub. L. No. 76-853, 54 Stat. 1137 (1940), as amended by the Second War Powers Act, Pub.L. No. 77-0507, § 1001, 56 Stat. 182 (1942) (the Act or the 1940 Act), they were entitled to apply for U.S. citizenship under greatly liberalized conditions. The time to apply under the 1940 Act expired on December 31, 1946. None of the petitioners applied for citizenship within the time allowed.

The panel hearing this case nevertheless granted petitioners citizenship. The panel divined authority for this

unusual action from the court's equity powers, justifying it as "the only effective remedy available" to rectify an "error" the Attorney General supposedly committed some 40 years ago. 796 F.2d 1091, 1103. This "error" was the Attorney General's failure to station an officer with naturalization authority in the Philippines during a nine-month period from October 1945 to August 1946. The Attorney General's action had come in response to concerns expressed to our State Department by the nascent Philippine government that a vigorous naturalization program on Philippine soil might result in a mass exodus of the new country's best young men.

II.

A. *Conflict with the Second Circuit*

The opinion's fulcrum is its determination that, by not stationing an immigration examiner in the Philippines for that nine months, "the Attorney General [denied] a class of eligible servicemen—in this case Filipinos—the benefits of the Act." 796 F.2d at 1098. But the Act did not give Filipino servicemen a right to citizenship. As the Second Circuit concluded in *Olegario*, "[a]t most, the statute provided [them] with *an opportunity* to become . . . citizen[s]." *Olegario*, 629 F.2d at 224 (emphasis added).

The Act gave the INS and the Attorney General considerable discretion in implementing the naturalization program. 1940 Act §§ 702-03. The question is whether the Attorney General abused this discretion in responding to the concerns of the soon-to-be-independent Philippine government. The Second Circuit carefully considered the question and concluded that he had not:

> The executive decision at issue here was thus based on policy considerations traditionally, although not exclusively, associated with the executive branch. The authority granted to the Commissioner and the Attorney General, to implement the Act without specific guidelines or restrictions, was sufficient to permit the executive to exercise some discretion when confronted with a seemingly delicate foreign affairs matter. . . . The decision to withdraw the naturalization examiner from the Philippines was not clearly beyond the limits of the Attorney General's discretion or contrary to Congress's vision of the executive's role in implementing the Act.

629 F.2d at 227. *See also id.* at 228 ("[t]he decision to withdraw all naturalization authority from the Philippine Islands for a nine month period was not a manifest abuse of . . . discretion").

Our panel's contrary conclusion is based on its assertion that "there is little room for doubt that the Attorney General's revocation of . . . authority [to perform naturalizations in the Philippines] was 'incompatible with the expressed will of Congress.'" 796 F.2d at 1099 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637-38, 72 S.Ct. 863, 871, 96 L.Ed. 1153 (1952) (Jackson, J., concurring)). The panel errs; there is plenty of room for doubt.

Section 702 of the Act speaks in mandatory terms only in describing the steps the naturalization petitioner must take in applying for citizenship: "The petition for naturalization of any petitioner under this section shall be made and sworn to before, and filed with, a representative of the Immigration and Naturalization Service designated by the Commissioner or a Deputy Commissioner. . . ." 1940 Act § 702. In all other respects the statute speaks in the permissive, leaving it to the "Commissioner, with the approval of the Attorney General," to establish the procedures for implementing the Act. *Id.* § 705.

The panel's conclusion that the Attorney General's action was contrary to the will of Congress, and therefore represented the "lowest ebb" of executive power, is simply

wrong. Nothing in the Act compelled the Attorney General to place immigration examiners in any one place at any one time. The panel's focus on snippets from the statute, generously punctuated with emphasis, 796 F.2d 1099-1100, cannot nullify the very broad discretion that the statute gave the Attorney General in implementing the naturalization program. So long as he acted out of a proper motive, and foreign relations surely is a proper concern of the executive branch, "[t]he decision to withdraw the naturalization examiner from the Philippines was not clearly beyond the limits of the Attorney General's discretion or contrary to Congress's vision of the executive's role in implementing the Act." *Olegario*, 629 F.2d at 227.

The panel derives much comfort from a statement in *INS v. Miranda*, 459 U.S. 14, 18, 103 S.Ct. 281, 283, 74 L.Ed.2d 12 (1982), that the Attorney General's decision to withdraw naturalization authority from the Philippines was clear error. 796 F.2d at 1099, 1102 & n. 15. But such heavy reliance on a stray remark made by the Court in an unrelated context by way of illustrating an entirely different point is misplaced. It is inconceivable that the Court resolved this important and difficult question in such an off-hand manner in a case where it was not argued, briefed or even at issue.

B. ***Disregard of Controlling Supreme Court Authority***

Some 13 years ago the Supreme Court summarily reversed our ruling that the Attorney General was estopped from denying these Filipino servicemen citizenship. In so doing the Court noted the twin public policies of the 1940 Act:

> Here the petitioner has been charged by Congress with administering an Act which both made available benefits of naturalization to persons in respondent's class and established a cutoff date for the claiming of

> such benefits. *Petitioner, in enforcing the cutoff date established by Congress,* as well as in recognizing claims for the benefits conferred by the Act, *is enforcing the public policy established by Congress.*

Hibi, 414 U.S. at 8, 94 S.Ct. at 21 (emphasis added). *Hibi* concluded that the Attorney General's withdrawal of naturalization authority from the Philippines did not amount to affirmative misconduct; it therefore held that the government could not be equitably estopped from enforcing the congressional policy embodied in the Act's expiration date.

The panel's decision here uses somewhat different language but the result it reaches is precisely that rejected by the Supreme Court in *Hibi:* There is no meaningful difference between saying that the government is equitably estopped from raising the statutory cutoff date and disregarding the cutoff date as a matter of equity. The panel substitutes words for concepts.

While the panel seeks to distinguish *Hibi*, unsuccessfully in my view, one aspect of the Court's ruling is beyond cavil: the determination that the December 31, 1946, cutoff date is one of the public policies of the 1940 Act. "[E]quity," wrote Justice Douglas, is "the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims." *Hecht Co. v. Bowles*, 321 U.S. 321, 329-30, 64 S.Ct. 587, 592, 88 L.Ed. 754 (1944). One searches the panel's opinion in vain for weighing, consideration, acknowledgment or even recognition of the "public policy established by Congress" in the December 31, 1946, cutoff date. *Hibi*, 414 U.S. at 8, 94 S.Ct. at 21. If equitable principles are relevant here at all, *but see* pp. [34a-35a], *infra*, the panel simply failed to apply them.

III

All of that having been said, one might nevertheless be inclined to overlook the panel's errors. The result it reaches is appealing; the fact situation is somewhat unusual; the precise issue may never arise again. There is a strong temptation, therefore, to treat the decision as a sport, unworthy of further thought or concern.

Unfortunately, it is not that simple. There are aspects of the panel's opinion that are far more disturbing even than its disregard of Supreme Court authority or disagreement with a sister circuit. The most fundamental questions raised by the opinion are when the federal courts may invoke the powers of equity and how far they may go when they do so. These issues, tucked away almost as an afterthought in the panel's conclusion, promise to be the opinion's most troublesome aspect, far transcending the case of these Filipino war veterans. What the panel has done goes to the very heart of our jurisprudence and will sow no end of mischief if followed as precedent.

I note first that the panel's exercise of equity powers rests on a fragile foundation. The opinion holds that "[i]n reviewing naturalization petitions, federal courts sit as courts of equity." 796 F.2d at 1102. This categorical assertion treats the issue as settled. In fact, as best I can tell, no other court has ever even considered the question. The panel supports its conclusion with an unadorned citation to *Fedorenko v. United States*, 449 U.S. 490, 516-18, 101 S.Ct. 737, 752-53, 66 L.Ed.2d 686 (1981). That case is not on point.

Fedorenko stands for the proposition that "a *de* naturalization action is a suit in equity." *Id.* at 516, 101 S.Ct. at 752 (emphasis added). Despite the similarity in names, naturalization proceedings and denaturalization proceedings are fundamentally different. Denaturalization involves the withdrawal of a right once granted; the exercise of judicial authority, including resort to equitable principles, is necessary and appropriate. Naturalization, on the other hand, is not an inherently judicial function. From time to time, Congress exercises the naturalization power directly by way of private bills or, as in the 1940 Act, vests naturalization authority in officers of the executive branch. By contrast, it is highly unlikely that Congress could constitutionally pass private denaturalization bills or grant executive branch officials final denaturalization authority. *See Vance v. Terrazas*, 444 U.S. 252, 259-60, 100 S.Ct. 540, 544-45, 62 L.Ed.2d 461 (1980) (Congress has no general power to take away American citizen's citizenship without his assent); *Afroyim v. Rusk*, 387 U.S. 253, 257, 87 S.Ct. 1660, 1662, 18 L.Ed.2d 757 (1967) (same). The panel does not explain why, in performing a function that can equally well be performed by officials of the other branches, judges must don the chancellor's robe. While the panel may ultimately be right, this issue of first impression deserves more analysis than an unexplicated citation to a case that does not advance the point.

The question of whether the court is right in invoking its equity powers turns out to be important because of the liberties the panel takes once it deems itself freed from the constraints of a court sitting at law. *See* pp. [36a-38a], *infra*. If equity can do all that the panel here says it can, courts must surely be far more cautious in asserting its authority.

Having invoked the powers of equity, the panel proceeds almost directly to its conclusion that it can and must provide the relief petitioners seek. It pauses only to recite a series of platitudes about the broad powers of equity courts. 796 F.2d at 1102-03. But the cases the panel cites stand merely for the unremarkable proposition that *once a right has been established* courts sitting in equity have

broad discretion to fashion a remedy. Nothing the panel cites even remotely suggests that equity courts can enforce rights denied by statute.

Contrary to the panel's apparent misapprehension, our equity courts do not dispense " 'equity [which] varies like the Chancellor's foot.' " *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417, 95 S.Ct. 2362, 2371, 45 L.Ed.2d 280 (1975) (quoting *Gee v. Pritchard*, 2 Swans. *403, *444, 36 Eng. Rep. 670, 674 (1818)). Instead, they must adhere to the established principles that govern their authority. 1 J. Story, *Equity Jurisprudence* 20 (Lyon ed. 1918). One fundamental principle of modern equity jurisprudence is that "[e]quity follows the law." G. McDowell, *Equity & the Constitution* 5 (1982). This means that equity courts are bound by statutory constraints no less than are law courts. *Hedges v. Dixon County*, 150 U.S. 182, 192, 14 S.Ct. 71, 74, 37 L.Ed. 1044 (1893); *see Rees v. City of Watertown*, 86 U.S. (19 Wall.) 107, 122, 22 L.Ed. 72 (1873) ("[a] court of equity cannot, by avowing that there is a right but no remedy known to the law, create a remedy in violation of law, or even without the authority of law"). As Story tells us, equity is "compelled to stop where the letter of the law stops." *See* 1 J. Story, *supra*, at 16. The letter of the law here precludes the panel's result in two important respects, neither of which the panel even considers.

First, the panel grants citizenship to petitioners who do not in fact meet the statutory criteria because they did not file their petition in a timely fashion. But it is crystal clear that the federal courts have no power whatsoever to disregard statutory naturalization requirements. In language that brooks no exceptions, the Supreme Court has stated: " 'Once it has been determined that a person does not qualify for citizenship, . . . the district court has no discretion to ignore the defect and grant citizenship.' " *Fedorenko*, 449 U.S. at 517, 101 S.Ct. at 752 (quoting

opinion below, 597 F.2d at 954). *Fedorenko*'s rationale conclusively forecloses the panel's result:

We repeat here what we said in one of these earlier cases:

> "An alien who seeks political rights as a member of this Nation can rightfully obtain them only upon the terms and conditions specified by Congress. Courts are without authority to sanction changes or modifications; their duty is rigidly to enforce the legislative will in respect of a matter so vital to the pubic welfare." *United States v. Ginsberg*, 243 U.S., at 474-75 [37 S.Ct. at 425].

See *Maney v. United States*, 278 U.S. at 22-23 [49 S.Ct. at 15-16]; *Johannessen v. United States*, 225 U.S., at 241-242 [32 S.Ct. at 616-617].

449 U.S. at 518, 101 S.Ct. at 753.

The panel was obviously familiar with *Fedorenko*, having cited it, albeit for a different proposition. *See* p. [34a] *supra*. But its opinion does not consider or address this language in *Fedorenko* which summarizes the Supreme Court's holding in that case. If *Fedorenko* can be distinguished, the panel fails to do so, apparently relying on its equity powers to shrug off a categorical directive from the Supreme Court. But it does not, in my view, serve the orderly development of law in this circuit to deny apparently controlling Supreme Court authority so much as a nod of acknowledgment.

Second, the panel trips lightly over the question of how a court, whether sitting in law or equity, can breathe life into a statute 40 years dead. Under what circumstances a court may disregard time limits set by Congress is a question frequently confronted by the courts; it is the subject of a substantial and well established body of law. There is, I think, a very persuasive argument that the Act's December 31, 1946, cutoff date is jurisdictional. Courts

have no general power to entertain naturalization petitions; they must act pursuant to a specific grant of congressional authority. Because petitioners cannot qualify for, and do not seek relief under, the current immigration act, 796 F.2d at 1096, the court's jurisdiction must be based, if it exists at all, on the 1940 Act. That Act, however, provides that naturalization petitions "shall be filed no later than" December 31, 1946. 1940 Act § 701. If the deadline petitioners missed is jurisdictional, that is the end of the matter and neither law nor equity can revive their claim. *See McIntyre v. United States,* 789 F.2d 1408, 1411 (9th Cir. 1986) (equity has no power to estop or toll a statutory time limit which is jurisdictional); *Burns v. United States,* 764 F.2d 722, 724 (9th Cir. 1985) (same).

On the other hand, a plausible argument could be made that the December 31, 1946, cutoff date is more akin to a statute of limitations. But statutes of limitations are tolled against the United States only under certain very limited circumstances, normally premised on some act of affirmative misconduct by government officials. *See, e.g. Gibson v. United States,* 781 F.2d 1334, 1344-45 (9th Cir. 1986) (Norris, J.) (fraudulent concealment), *cert. denied,* ____ U.S. ____, 107 S.Ct. 928, 93 L.Ed.2d ____ (1987); *Hyatt v. Heckler,* 807 F.2d 376 (4th Cir. 1986) ("clandestine policy" to prevent plaintiffs from learning that their rights were violated). The Supreme Court's determination in *Hibi* that the government did not engage in affirmative misconduct, 414 U.S. at 8-9, 94 S.Ct. at 21-22, decisively forecloses this as a basis for tolling.

Whether the December 31, 1946, cutoff date is a jurisdictional provision or a statute of limitations, therefore, makes no difference; there appears to be no basis for disregarding it. Far more troubling, the principles that govern this area of law, and the limited exceptions conceivably available, are nowhere addressed in the panel's opinion. Instead, the panel cuts a swath through

the entire field, ignoring authorities it apparently cannot distinguish. If equity empowers a court to do this, no principle of law is safe from judges bent on reaching a result they deem just.[1]

This, in my view, is the most pernicious aspect of the panel's opinion. By invoking the powers of equity, on a highly tenuous basis I would submit, the panel has freed itself of the need to even consider the controlling legal principles that bear on the issue. If a federal court can so easily sidestep precedent, including explicit directives from the Supreme Court, every federal judge becomes a law unto himself and cases will turn entirely on who happens to be hearing them.

In the final analysis, the panel's action is based on its conclusion that it has identified a problem and that it alone can provide an effective remedy. 796 F.2d at 1103.[2]

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[1] Unbridled equitable power has been viewed with some trepidation since the earliest days of the Republic:

> It is a very dangerous thing to vest in the same judge power to decide on the law, and also general powers in equity; for if the law restrain him, he is only to step into his shoes of equity, and give what judgment his reason or opinion may dictate. . . .

The Federal Farmer, Letter III (Oct. 10, 1787), in *2 The Complete Anti-Federalist* 244 (H. Storing ed. 1981). I would have thought that two centuries of fine tuning had put these concerns behind us.

[2] When the opinion asserts that "[t]here is simply no other way to restore the lost opportunity for citizenship that Congress offered [petitioners] as a just reward for their military service in World War II," 796 F.2d at 1103, it overstates the point and does so in a way that denigrates the function and authority of Congress and the executive. The fact of the matter is that Congress has taken up this issue and, so far at least, has refused to grant relief. In the second session of the 98th Congress, Representative Dymally introduced two bills (H.R. 4895, 98th Cong., 2d Sess. (1984) and H.R. 5875, 98th Cong., 2d Sess. (1984)) designed to extend naturalization rights to Filipino veterans despite the statutory deadline. Both bills died in committee.

When our coordinate branches of government have considered the matter and refused to provide a remedy, it seems to me that the

But whether a court is sitting in law or equity, identifying a problem that needs a solution is just not enough; the court must first have authority to act. As another panel of this court recently noted, "[t]he commission of a federal judge is not a 'general assignment to go about doing good.' " *Toussaint v. McCarthy,* 801 F.2d 1080, 1087 (9th Cir. 1986) (quoting *Jett v. Castaneda,* 578 F.2d 842, 845 (9th Cir. 1978)). The panel here apparently disagrees.

CONCLUSION

This is the third attempt by a panel of this court to confer citizenship upon Filipino veterans under the long-expired 1940 Act. The two prior attempts were rebuffed by the Supreme Court, once summarily. *United States v. Mendoza,* 464 U.S. 154, 104 S.Ct. 568, 78 L.Ed.2d 379 (1984); *Hibi,* 414 U.S. 5, 94 S.Ct. 19. The Second Circuit's approach in *Olegario* is well-reasoned, comports with the language of the statute and accords proper deference to the decision of a coordinate branch of our government taken 40 years ago in the area of foreign relations, uniquely within the province of the executive. The panel's opinion effectively overrules *Olegario* since no knowledgeable petitioner will pursue citizenship in the Second Circuit in lieu of the Ninth. Moreover, the opinion

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justification for judicial intervention is, applying Justice Jackson's aphorism, "at its lowest ebb." By granting applicants the relief they seek, the court has short-circuited the political process, pretermitting the actions and intentions of those in Congress and the executive who have considered and may wish to continue considering the problem. While this may be proper when the court determines that actions of Congress or the executive violate the Constitution, it is a far more difficult question where, as here, the court is relying entirely on inherent equitable powers. The availability of a solution through the political process, at the very least, lessens the justification for extraordinary judicial relief.

cannot be squared with the Supreme Court's pronouncements in *Hibi* and *Fedorenko,* stretches the court's equity powers far beyond previously accepted limits, and calls into question established principles as to congressionally mandated time limitations. These, it seems to me, are ample reasons for taking the case en banc, vacating the panel's opinion and affirming the judgment of the district court.

APPENDIX E

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Nos. 80-4441, 80-4543, 81-5427

RE NATURALIZATION OF RENATO LEOPOLDO BARRETTO,
PETITIONER-APPELLANT,

v.

UNITED STATES OF AMERICA, RESPONDENT-APPELLEE.

RE NATURALIZATION OF ANTOLIN
PUNSALAN PANGILINAN, ET AL., PETITIONERS-APPELLANTS,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
RESPONDENT-APPELLEE.

RE NATURALIZATION OF MARIO VALDERRAMA LITONJUA,
PETITIONER-APPELLANT,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
RESPONDENT-APPELLEE.

Argued and Submitted Aug. 13, 1982

Decided Dec. 10, 1982

Before SCHROEDER, FLETCHER and NORRIS, Circuit Judges.

NORRIS, Circuit Judge:

These are three more in a series of Filipino war veteran cases arising under §§ 701-705 of the Nationality Act of

1940, Pub.L. No. 76-853, Ch. 199, 54 Stat. 1137, *as amended* by Pub.L. No. 77-507 § 1001, 56 Stat. 182 ("1940 Act"). Appellants are all Filipino veterans who served honorably in the United States armed services during World War II. They claim that they are entitled to United States citizenship under the 1940 Act because they were denied due process of law when the United States Attorney General removed an authorized naturalization officer from the Philippines in October 1945. They also contend that the government is collaterally estopped by the judgment in *Matter of Naturalization of 68 Filipino War Veterans,* 406 F.Supp. 931 (N.D.Cal.1975) ("*68 Filipinos*") from relitigating their due process claims. The district courts denied all petitions. We reverse and grant the petitions.

I

A.

The history of this litigation is discussed at length in *Mendoza v. United States*, 672 F.2d 1320 (9th Cir.1982) and *68 Filipinos*. We repeat it briefly here.

In March 1942, Congress amended the Nationality Act of 1940, Pub.L. No. 76-853, 54 Stat. 1137, to provide for naturalization of non-citizens who served honorably in the United States armed forces. 56 Stat. 182 (repealed 66 Stat. 280, June 27, 1952). As amended, the 1940 Act exempted alien servicemen from certain of the usual naturalization requirements, *id.* at § 701, and provided for overseas naturalization of servicemen on active duty. *Id.* at § 702. As further amended, the Act required that all petitions for naturalization under §§ 701 and 702 be filed by December 31, 1946. Act of Dec. 28, 1945, Pub.L. No. 79-270, § 202(c)(1), 59 Stat. 658 (repealed 66 Stat. 280, June 27, 1952).

In early August 1945, the Immigration and Naturalization Service (INS) designated George Ennis, Vice Consul in Manila, to naturalize Filipino servicemen under the 1940 Act. But when the Philippine government expressed concern that naturalizations under the Act would drain the country of much-needed manpower, the Attorney General revoked Vice Consul Ennis' naturalization authority. As a result, between October 1945 and August 1946, no INS official was present in the Philippines to naturalize eligible servicemen.

B.

In 1975, the claims of 68 Filipino war veterans, whose petitions for naturalization pursuant to the 1940 Act had been denied by the INS, were joined in district court. *Matter of Naturalization of 68 Filipino War Veterans,* 406 F.Supp. 931 (N.D.Cal.1975) (Renfrew, J.). Judge Renfrew divided the petitioners into two relevant categories: those who had taken some action to be naturalized in the Philippines prior to December 31, 1946, but had not been processed by the INS (Category I), and those who had taken no action to be naturalized in the Philippines (Category II)[1]. Judge Renfrew granted the petitions of "Category I" veterans on the alternate grounds that the government had engaged in "affirmative misconduct," which estopped it from contesting the veterans' petitions, and that the petitions had been "constructively filed" within the statutory deadline. *Id.* at 937-40. Judge Renfrew granted the petitions of "Category II" veterans on the ground that withdrawal of the naturalization examiner from the Philippines violated the equal protection component of the Due Process Clause of the Fifth Amendment. *Id.* at 951. The government filed a notice of appeal, but then withdrew it, permitting the judgment to become final.

[1] A third category included Filipinos who could not prove that they had been eligible for naturalization under §§ 701-705.

II

A.

Appellant Pangilinan is one of fourteen Filipino veterans whose petitions were consolidated on appeal. We treat all fourteen as "Category II" veterans on the basis of a stipulation that their petitions raise issues identical to those raised by the "Category II" veterans in *68 Filipinos.* All served honorably in the United States armed forces; all were in the Philippines on active service for some or all of the time that naturalization authority was withdrawn; and none took steps to become naturalized while in the Philippines.

We also conclude the appellant Litonjua should be treated as a "Category II" veteran[2]. He enlisted in the United States Navy in 1941 and became a prisoner of war in 1942. After his release in early 1945, Litonjua rejoined his unit in the Philippines, where he remained in active service until he was honorably discharged on April 10, 1946.[3] Thus, he was in the Philippines and eligible to be naturalized during a six month period (October 1945 to April 1946) when there was no INS official available to process his petition.

[2] Although it did not raise the argument in its brief, the government asserted at oral argument that Litonjua is not a "Category II" veteran because he sought naturalization in Seattle after his discharge from the military. The argument is meritless. Litonjua was in the Philippines for six of the nine months that naturalization authority was withdrawn and, like the "Category II" veterans in *68 Filipinos,* he made no effort during that period to be naturalized under § 702. *See Mendoza,* 672 F.2d at 1326 n.8.

[3] Shortly thereafter, Litonjua went to Seattle, Washington as a civilian employee of the United States Army Transport Service. While in Seattle, he took steps to become naturalized under the 1940 Act, but, for reasons that are not clear on the record, the petition process was not completed. Litonjua is not, however, a "Category I" veteran,

Because the theory of Barretto's claim differs from that of Pangilinan and Litonjua, we treat the status of his naturalization petition in Part III.

B.

Although Litonjua and the Pangilinan petitoners are "Category II" veterans, the district judges below declined to estop the government from relitigating the issues decided in *68 Filipinos*. Instead, they reached the merits of appellants' constitutional claims, and, relying on *Olegario v. United States,* 629 F.2d 204 (2d Cir. 1980), *cert. denied,* 450 U.S. 980, 101 S.Ct. 1513, 67 L.Ed.2d 814 (1981), denied the veterans' petitions. In so doing, they acted without the benefit of our decision in *Mendoza v. United States,* 672 F.2d 1320 (9th Cir. 1982), in which we affirmed a district court judgment collaterally estopping the government on precisely these facts. Accordingly, the threshold legal question in the Litonjua and Pangilinan appeals is the effect of our decision in *Mendoza* on the question whether the government should be precluded from relitigating issues decided in *68 Filipinos*[4].

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because the "Category I" veterans in *68 Filipinos* sought naturalization under § 702 while still on active duty in the Philippines. Litonjua claims that he should nonetheless be deemed to have constructively filed his petition before the statutory deadline. Because we resolve his case on an alternate ground, we do not reach this issue.

[4] Because the relevant facts are not in dispute, this court is equipped to decide whether, in light of *Mendoza,* collateral estoppel should be invoked offensively against the government in the *Pangilinan* and *Litonjua* cases. See *Starker v. United States,* 602 F.2d 1341 (9th Cir. 1979). In *Starker,* as here, the district court declined to estop the government collaterally, but did so without the benefit of the Supreme Court's decision in *Parklane Hosiery v. Shore,* 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979). Rather than remand to the district court for reconsideration in light of *Parklane Hosiery,* our court made an independent determination to apply collateral estoppel against the government, reasoning that "we [could] discern no useful purpose in a

The facts presented in *Mendoza* were similar to those at issue here. Dr. Mendoza, like Litonjua and the Pangilinan petitioners, qualified as a "Category II" veteran. He served in the United States armed forces from December 1, 1941 until June 30, 1946. During that time, he was captured by the Japanese and survived the Bataan Death March. Once released by the Japanese, he was sent to the United States for army medical training; six months later, he returned to the Philippines, where he remained for the duration of his service. At no point during that time—indeed, not until 1978—did he make any effort to become an American citizen. The district court, in granting Dr. Mendoza's petition for naturalization, applied the doctrine of collateral estoppel based upon the guidelines set out in *Parklane Hosiery v. Shore,* 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979), which encouraged use of collateral estoppel offensively when its application would not be unfair to the defendant.[5] We held that the district court did not abuse its discretion because the "dual purpose of protecting litigants from the burden of relitigating an identical issue . . . and of promoting judicial economy by preventing needless litigation," *id.* at 326, 99 S.Ct. at 649, would be served by barring the government from relitigating issues decided in *68 Filipinos. Mendoza,* 672 F.2d at 1325-26.

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remand for the exercise of the discretion called for in *Parklane Hosiery.* This court can apply to agreed facts the discretionary standards set out in that opinion." *Starker,* 602 F.2d at 1349. Similarly, no useful purpose would be served by a remand to determine on the basis of the agreed facts the legal effect of our decision in *Mendoza* on the Litonjua and Pangilinan petitions.

[5] The Court in *Parklane Hosiery* identified several potential sources of unfairness: if potential plaintiffs sit on the sidelines until another plaintiff has obtained a favorable judgment; if the second action involves substantially higher stakes than the first, or affords the defendant procedural opportunities not originally available; or if circumstances have changed by the time of the second suit. 439 U.S. at 330-31, 99 S.Ct. at 651-52.

We were unpersuaded by the government's argument that it would be unfair[6] to grant Dr. Mendoza's naturalization petition without reaching the merits of his equal protection claim.

To support its claim of unfairness, the government in *Mendoza* first asserted that it had prematurely withdrawn its appeal in *68 Filipinos* because it had grossly underestimated the number of Filipinos who would become eligible for naturalization under its holding. We found no record support, however, for the contention that, after withdrawing its appeal, the government discovered that as many as 60,000–80,000 Filipino veterans could be expected to petition for naturalization in reliance upon Judge Renfrew's decision in *68 Filipinos*. The government, for instance, did not indicate how many of those potential applicants had in fact petitioned after *68 Filipinos* was decided in 1975, or how many of those veterans actually eligible to petition were realistically likely to do so nearly 40 years after the end of World War II. In fact, the record suggested that only a very few Filipinos had taken advantage of the opportunity; congressional testimony by INS officials indicated that no more than 100 Filipinos had applied for naturalization as of 1978. 672 F.2d at 1327. In the cases now before us, the government has made no effort to challenge that testimony or otherwise bolster its claim of unfairness; in fact, at oral argument the government formally abandoned its contention that the issues in *68 Filipinos* should be relitigated because it had grossly miscalculated the impact of that decision on the number of naturalization petitions from Filipino war veterans it could expect to receive.

[6] The government did not contend that Dr. Mendoza had adopted a "wait and see" attitude to reap the fruits of the earlier litigation; we thus did not reach the issue whether application of collateral estoppel would have been inappropriate on that score.

In *Mendoza,* we also rejected the government's argument that collateral estoppel should be invoked offensively only against private litigants. *Id.* at 1329. Acknowledging that relitigation by the government might be warranted in cases raising significant issues of public policy or constitutional law, we nonetheless found no compelling need for relitigation in that case.

The merits of these arguments were thus fully considered in *Mendoza,* and need not be reconsidered here. We now address the government's sole remaining argument[7] that giving collateral estoppel effect to *68 Filipinos* would insulate significant constitutional issues from appellate review. *See Montana v. United States,* 440 U.S. 147, 163, 99 S.Ct. 970, 978, 59 L.Ed.2d 210 (1979) (cautioning that collateral estoppel should not be applied lightly where to do so might freeze constitutional doctrine on significant national issues); *Mendoza,* 672 F.2d at 1329-30. Although we readily agree that the constitutional issues raised in *68 Filipinos* are significant, we believe that the government overstates the precedential value of *68 Filipinos,* which is, after all, a district court opinion rendered on extraordinary facts. The events giving rise to the *68 Filipinos* claims occurred over 35 years ago in the unusual context of a war-related immigration statute and the impending independence of the Philippines; it is highly improbable that the government will again be involved in litigation involving analogous facts. And if legal issues analogous to those resolved in *68 Filipinos* arise on different facts, the government would be free to relitigate them, *see Commissioner v. Sunnen,* 333 U.S. 591, 601-02, 68 S.Ct. 715, 721, 92 L.Ed. 898 (1948); *Montana v. United States,* 440 U.S. at 162-63, 99 S.Ct. at 978, burdened only

[7] As in *Mendoza,* the government does not suggest that Litonjua and the Pangilinan petitioners could have joined the *68 Filipinos* litigation and thus that they are unfairly profiting from its results.

by a district court opinion as related precedent.[8] Thus, application of collateral estoppel would not freeze constitutional doctrine on important national issues or otherwise inhibit healthy development of the law.

Absent a change in circumstances, which the government has neither claimed nor demonstrated, therefore, *Mendoza* must control the disposition of the *Pangilinan* and *Litonjua* appeals. We conclude that our determination in *Mendoza* that it is not unfair to estop the government from contesting the naturalization petitions of "Category II" veterans is binding in these cases as *stare decisis*. To permit district courts in the Ninth Circuit to redetermine the issue of fairness after our decision in *Mendoza*—and thus treat identically situated "Category II" veterans differently from Dr. Mendoza—would be abhorrent to the principles of consistency and fairness that underlie the doctrine of *stare decisis, see Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 272, 100 S.Ct. 2647, 2656, 65 L.Ed.2d 757 (1980), and would undermine "public faith in the judiciary as a source of impersonal and reasoned judgments" *Moragne v. States Marine Lines, Inc.* 398 U.S. 375, 403, 90 S.Ct. 1772, 1789, 26 L.Ed.2d 339 (1970).

For the foregoing reasons, therefore, we hold that the government is collaterally estopped from relitigating against these "Category II" veterans the issues decided in *68 Filipinos*.[9] This result is consistent with the guidelines

[8] Moreover, since the Second Circuit has declined to collaterally estop the government, and has disagreed with *68 Filipinos* on the merits, *Olegario v. United States*, 629 F.2d 204, 214-15, 130 (2d Cir. 1980), *cert. denied*, 450 U.S. 980, 101 S.Ct. 1513, 67 L.Ed.2d 814 (1981), there is a conflict in the circuits, and courts addressing analogous legal issues on new facts will have the benefit of both opinions.

[9] We do not hold that the trial judges, who ruled without the benefit of *Mendoza*, abused their discretion in denying collateral estoppel. Rather, we hold that, in light of *Mendoza*, the government is now estopped as a matter of law.

set out in *Parklane Hosiery*. Once it has been conclusively determined that collateral estoppel is not unfair to a defendant, and does not reward a plaintiff who could easily have joined the initial suit, we believe that, absent a change of circumstances, *Parklane Hosiery* requires its application as a matter of law. By deciding as we do, we thus adhere both to the standards set in that case and to the reasoning of our *Mendoza* decision.

III

We now turn to Appellant Barretto's petition. Barretto joined the United States armed forces in August 1941. He saw active duty in Central Luzon, Bataan and Corregidor and was imprisoned by the Japanese from May 1942 to November 1943. In February 1945, Barretto was assigned to flight training duty in the United States. While there, he tried to file a preliminary application for naturalization under the 1940 Act, but the INS would not accept his application because it lacked the signature of his commanding officer.[10] Barretto returned to the Philippines on June 10, 1946 and was discharged from the United States armed forces on June 30, 1946.

Barretto filed this petition for naturalization in June 1977, and the government withdrew its *68 Filipinos* appeal in November 1977. Because several Filipino veterans apparently agreed with the INS to hold their claims in abeyance pending the outcome of the appeal in *68*

[10] Barretto was unable to obtain the signature because his commanding officer was in the Philippines. Barretto argues that the signature was required only on the filing of a formal petition and that the refusal to accept his preliminary application was "affirmative misconduct," and that the government is thus estopped from contesting his petition. Because we decide his case on an alternate ground, we do not reach this issue.

Filipinos, the government has adopted a "grandfather" policy of granting any petitions filed by "Category II" veterans before withdrawal of the *68 Filipinos* appeal.[11] Brief of Respondent-Appellee at 13 n. 21; Supplemental Brief of Respondent-Appellee at 2-6. *See, e.g., United States v. Domingo v. Avena,* No. ____ (N.D. Cal. Jan. 17, 1979), *appeal withdrawn,* No. 79-4361 (9th Cir. ____ 1979). At oral argument, the government stipulated that it would withdraw its opposition to Barretto's petition if this court finds that Barretto is a "Category II" veteran within the meaning of *68 Filipinos.*

The district court held that Barretto is not a "Category II" veteran because he was not prejudiced by the government's withdrawal of naturalization authority from the Philippines. The district court reasoned that Barretto was in the United States during much of the period that a naturalization officer was absent from the Philippines; that Barretto was stationed in the Philippines and eligible for naturalization under § 702 for only twenty days of that period; and that Barretto testified that he made no attempt to inquire about naturalization after he returned to the Philippines.

We cannot agree that Barretto is disqualified from relief because he was in the Philippines and eligible for naturalization under § 702 for only twenty days. In *Mendoza,* we found that Dr. Mendoza's presence in the Philippines for as much as three months, after having been in the United States for several months, was sufficient to implicate Dr. Mendoza's due process rights, 672 F.2d at 1326 n. 8; we know of no principled basis—and the government offers none—for drawing a line between three months in

[11] The government has also adopted a policy of granting all petitions of "Category I" veterans, whether filed before or after withdrawal of the appeal in *68 Filipinos.* Brief of Respondent-Appellee at 13 n. 21.

Dr. Mendoza's case and three weeks in this case. If the government's conduct violated the constitutional rights of Filipinos serving in the United States armed forces in the Philippines, it violated their rights whether they were in the Philippines for nine months or nine days.

Nor do we agree that Barretto's failure to inquire about naturalization upon his return to the Philippines disqualifies him from relief as a "Category II" veteran. None of the "Category II" veterans in *68 Filipinos* had taken steps to be naturalized, and we see no reason to distinguish Barretto's inaction from theirs simply because Barretto knew of his right to naturalization under the 1940 Act.[12] Barretto has shown that he would have been eligible for naturalization in the Philippines if an INS officer had been present, and that he wished to avail himself of his right to naturalization. He has thus demonstrated "a 'distinct and palpable injury' . . . [and] a 'fairly traceable' causal connection between the claimed injury and the challenged conduct," *Duke Power Co. v. Carolina Environmental Study Group, Inc.,* 438 U.S. 59, 72, 98 S.Ct. 2620, 2630, 57 L.Ed.2d 595 (1978) (citations omitted), and he has standing as a "Category II" veteran to challenge the government's actions. Thus, pursuant to the government's "grandfather" policy and its stipulation in court, we hold that Barretto is legally entitled to be naturalized.

The judgments of the district courts are REVERSED and the naturalization petitions of all appellants in these consolidated appeals are GRANTED.

[12] The opinion in *68 Filipinos* does not indicate whether the "Category II" veterans did or did not know of their rights under §§ 701-705. In any event, the record does not show that Barretto knew there was a possibility of being naturalized while outside the United States. Thus, even if relevant, we could draw no negative inference from his failure to seek naturalization in the Philippines.

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

No. 23358

IN THE MATTER OF THE PETITION OF
MARIO VALDERRAMA LITONJUA

[Filed Apr. 9, 1981]

MEMORANDUM DECISION AND ORDER

Petitioner is a native and citizen of the Philippines. In 1941, he enlisted in the United States Navy. He became a prisoner of war on May 6, 1942. He rejoined his unit on March 21, 1945. He received an honorable discharge on April 10, 1946.

Petitioner testified that while he was in the Navy, he made no effort to apply for United States citizenship because he thought that the only way he could be naturalized was to be physically present in the United States.

In June of 1946, petitioner accepted employment as a civilian with the United States Army Transport Service. He was physically present in the Philippines until early July, 1946, when he departed for the United States on his employer's vessel. Shortly after his arrival in Seattle, Washington, petitioner inquired with the Seattle Immigration Service office regarding the requirements for naturalization.

Petitioner testified that the Immigration Service instructed him not to leave the United States without first contacting the Service and that further processing of his case required verification of his military service.

About 5:00 p.m. on August 16, 1946, petitioner was notified by his employer that he was to depart the Philippines on the next day, a Saturday. Petitioner testified that he attempted to call the Immigration Service but received no answer. He testified that he did not write a letter subsequent to his departure because he was waiting for the Immigration Service to inform him on the status of his application.

Petitioner is seeking naturalization under Sections 701-705 of the Nationality Act of 1940, as amended. 56 Stat. 182-183. Petitioner is ineligible for naturalization under the current statute, 8 U.S.C. § 1440, which requires that eligible servicemen either have enlisted in particular geographical areas not including the Philippines or have been admitted to the United States as permanent residents. The sole issue presented to this court is whether petitioner can be naturalized under the 1940 Act which expired on December 31, 1946.

The Government consents to the application of the 1940 Act and naturalization of some Filipino World War II veterans (Category I veterans) and opposes the application of the 1940 Act and naturalization of others (Category II veterans). The landmark case is *Naturalization of 68 Filipino War Veterans*, 406 F.Supp. 931 (N.D. Cal. 1975) (hereinafter cited as *68 Veterans*).

The court finds that petitioner is not a Category I veteran. The overseas naturalization under Section 702 applied only during active service in the armed forces. According to his own testimony, petitioner took no action while in the armed forces. The Category I veterans in *68 Veterans* all took action while in the service.

Petitioner is a Category II veteran. He did not apply for naturalization while on active duty in the armed forces.

Petitioner has standing to bring this action. This case does not turn on whether petitioner can prove that he would have been naturalized but for the Attorney General's

decision to withdraw the naturalization examiner from the Philippines. Petitioner has demonstrated "an injury to himself that is likely to be redressed by a favorable decision," *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38 (1976), and has shown a "fairly traceable causal connection between the claimed injury and the challenged conduct." *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 72 (1978).

The precise issue in this case involves the due process constraints on the executive authority. Although the naturalization statute at issue here was enacted and implemented during World War II, it was not a military measure and did not directly concern the war effort. While the court is not equipped to judge the merits of naturalization laws or the wisdom with which they are implemented, it can determine whether the government's actions were arbitrary, unauthorized and unconstitutional. Thus, the court finds that petitioner's claim is not foreclosed by the political question doctrine under any of the standards described in *Baker v. Carr*, 369 U.S. 186 (1961).

The court finds that petitioner is not barred by laches from instituting this action. Laches demands more than delay; it requires lack of diligence. *City of Davis v. Coleman*, 521 F.2d 661 (9th Cir. 1975). The Government has failed to establish that petitioner has slept upon his rights and has failed to establish that the Government will be unfairly prejudiced by petitioner's delay in instituting this action. Moreover, petitioner's due process claim, which is distinct from a claim of estoppel against the government, is not barred by the Supreme Court's decision in *INS v. Hibi*, 414 U.S. 5 (1973) (Filipino war veteran could not claim estoppel against the government for its failing to advise him of right to naturalization under the 1940 Act).

The court finds that Section 310(e) of the Immigration and Nationality Act of 1952, 75 Stat. 656, 8 U.S.C. § 1421(e), cannot be applied to negate the due process

rights of petitioner. The Ninth Circuit's ruling in *United States v. Pasion*, 524, F.2d 249 (9th Cir. 1975), is inapplicable to the case at bar since the court in *Pasion* did not consider whether Section 310(e) should be applied to deny a constitutional remedy.

The court has found that petitioner's claim is neither a nonjusticiable political question nor barred by *Hibi*, statutory, or equitable limitations. Thus, the court is faced squarely with reviewing the merits of petitioner's constitutional arguments.

Petitioner was a United States national protected by the United States Constitution until the Philippines became an independent country on July 4, 1946. *See Johnson v. Eisentrager*, 339 U.S. 763, 771, 780 (1950). Petitioner can assert a claim based on the Due Process Clause of the Fifth Amendment and the Equal Protection rights derived from that provision. *See Hampton v. Mow Sun Wong*, 426 U.S. 88, 100 (1976); *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). Thus, petitioner was entitled to claim the protections of the Due Process Clause at the time the naturalization examiner was withdrawn from the Philippines. However, the court, following the recent Second Circuit opinion in *Olegario v. United States*, 629 F.2d 204 (2d Cir. 1980), *cert. denied*, 49 U.S.L.W. 3663 (March 9, 1981), finds no due process violation arising from the withdrawal of the naturalization examiner.

The withdrawal of the naturalization examiner from the Philippines did not constitute an unconstitutional exercise of executive authority. While Congress is vested with authority over naturalization, the executive's wide discretion in foreign affairs may affect national policy toward noncitizens. *See Hampton v. Mow Sun Wong*, 426 U.S. 88, at 105, 114, 115 (1976). The court finds that the Attorney General's decision to withdraw the naturalization examiner from the Philippines was a response to the concern expressed by the Philippine government that too many Filipino males would be lost to naturalization by the

United States. The authority granted to the Immigration and Naturalization Commissioner and the Attorney General to implement the 1940 Act without specific guidelines or restrictions, was sufficient to permit the executive to exercise some discretion when confronted with the request by the Philippine government to withdraw the authority of the naturalization examiner. The court concludes that the decision to withdraw the naturalization examiner from the Philippines was not beyond the limits of the Attorney General's discretion or Congress' mandate for the executive branch to implement the 1940 Act.

Having concluded that the withdrawal of the naturalization examiner from the Philippines was neither unauthorized nor inconsistent with Congress' intent, the question before this court is whether the national interests at stake justified this decision. "When the federal government seeks to sustain a rule discriminatory against noncitizens in a manner which would violate equal protection if adopted by a state, it must demonstrate that the rule substantially furthers important federal interests in the regulation of immigration and naturalization." *Mow Sun Wong v. Hampton,* 435 F.Supp. 37, 44 (N.D. Cal. 1977). The equal protection analysis involves significantly different considerations when it concerns the relationship between aliens and the states rather than the relationship between aliens and the federal government. *Mathews v. Diaz,* 426 U.S. 67, 84-85 (1976). The analysis in *68 Veterans* relied primarily on Fourteenth Amendment cases which applied the compelling state interest test to alienage classifications by the states. However, Supreme Court cases decided after *68 Veterans* demonstrate that this heightened scrutiny is inappropriate for federal policies and regulations, particularly in the areas of immigration and naturalization.

The court concludes that the decision made by the Immigration and Naturalization Commissioner and the Attorney General to withdraw the naturalization examiner from the Philippines was justified in light of the express federal interest in responding to the concerns voiced by the Philippine government. While this action did have an adverse impact on Filipino servicemen, it was justified by a sufficiently important interest in foreign affairs to satisfy the appropriate constitutional standard.

Finally, the court holds that the Government's failure to appeal the decision in *68 Veterans* does not collaterally estop the Government from relitigating the constitutional issues raised by Category II Veterans. Petitioner's reliance on *Parklane Hosiery Co. v. Shore,* 439 U.S. 322 (1979), which approved the use of "offensive" collateral estoppel under certain circumstances, is misplaced. The decision not to appeal the *68 Veterans* case may have resulted from a variety of factors—scarcity of resources, potential impact, public interest—which were totally unrelated to the legal issues of the case.

The court has no doubt that petitioner would be a fine citizen. However, the court concludes that the Second Circuit in *Olegario v. United States, supra,* has correctly analyzed the law. The court concludes that the correct analysis of the law requires the denial of the petition for naturalization.

Accordingly, it is ordered that the petition for naturalization be denied.

IT IS SO ORDERED.

Dated: April 8, 1981.

/s/ GORDON THOMPSON, JR

Gordon Thompson, Jr. Judge
United States District Court

APPENDIX G

IN THE DISTRICT COURT OF THE UNITED STATES
IN AND FOR THE NORTHERN DISTRICT OF
CALIFORNIA AT SAN FRANCISCO, CALIFORNIA

IN THE MATTER OF THE PETITION FOR
NATURALIZATION PURSUANT TO SECTIONS 701 & 702
NATIONALITY ACT OF 1940

[Filed Sep. 24, 1980]

DENIAL ORDER

The following petitioners for naturalization have all agreed by stipulation that the issues raised in these petitions, both of fact and law, are identical to the issues of fact and law presented in the Category II petitions in the *Naturalization of 68 Filipino War Veterans,* 406 F. Supp. 931 (N.D. Cal. 1975). All of these petitioners submitted their application after November 30, 1977.

Upon consideration of the Findings of Fact, Conclusions of Law and Recommendations of the Designated Naturalization Examiner of the Immigration and Naturalization Service, and the decision of *Antonio Olegario v. United States,* Docket No. 79-6179 (2d Cir. July 16, 1980), IT IS HEREBY ORDERED that each of these 17 petitions, presented in open court the 27th day of August, 1980, listed below, be, and hereby, is, denied.

No.	Petition No.	Name of Petitioner
5.	251849	Antolin Punsalan Pangilnan [*sic*]
6.	251866	Antonio Gutierrez Magadia
8.	253028	Mariano Valera Cardenas
10.	257890	Panfilo Jabalde
11.	257893	Fidel Zosimo Usi Canilao
12.	257939	Antonio Patdo Tantay

No.	Petition No.	Name of Petitioner
13.	257943	Arcadio Revilla Nepomuceno
16.	259187	Dionisio Vallejos Lucas
17.	259197	Efren Almonte Del Mundo
20.	259822	Oliver Juan Posadas
23.	267623	Vicente Miranda Belizario
24.	267645	Rodolfo De Jesus Batac
25.	267654	Pedro Dumlao Ponciano
26.	268252	Cesar Jocson Ascalon
28.	268438	Winifredo Pableo Bello
29.	268448	Bonifacio Leoncio Zarcal
30.	268479	Benjamin Natividad Bonus

IT IS FURTHER ORDERED that these petitions be consolidated so that a single record may be prepared for purposes of any appeal which may be taken.

IT IS FURTHER ORDERED that the petitions listed below be continued, as they did not conform to the agreed stipulation. They will be presented at regularly scheduled hearings, when the issues in the individual petitions are decided.

No.	Petition No.	Name of Petitioner
1.	248961	Vicente Banares Abecendario
2.	251819	Ruben Aluz Copico, Sr.
3.	251841	Luna Gozom Javier
4.	251846	Tomas Alacon Borja
7.	251887	Wenceslao Gallego Lamson
9.	257878	Juan Salvador Tiletile
14.	259171	Gregorio Cahiuinana Ybardolaza
15.	259182	Andres Valenzuela Valencia
18.	259230	Castro Rito Magsaysay
19.	259254	Demetrio Joaquin Saldana
21.	259836	Lucio Raymundo Gallardo
22.	261949	Simeon Malapit Abastilla
27.	268254	Jorge Tubayan Poblete

By the Court, this 24th day of September, 1980.

/s/ WILLIAM W. SCHWARZER
United States District Judge

APPENDIX H

IN THE DISTRICT COURT OF THE UNITED STATES
IN AND FOR THE NORTHERN
DISTRICT OF CALIFORNIA
AT SAN FRANCISCO, CALIFORNIA

Petition No. 251849

PETITION FOR NATURALIZATION

OF

ANTOLIN PUNSALAN PANGILINAN

**FINDINGS OF FACT,
CONCLUSIONS OF LAW AND RECOMMENDATIONS
OF DESIGNATED NATURALIZATION EXAMINER**

TO THE HONORABLE, THE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE NORTHERN DISTRICT OF CALIFORNIA:

1. PRELIMINARY STATEMENT: The undersigned, duly designated under the Immigration and Nationality Act to conduct preliminary examinations upon petitions for naturalization, respectfully submits that the above-named petitioner, a native and national of the Philippines, age 64 years, presently in the United States in the status of visitor, filed the petition for naturalization numbered above on June 19, 1978, under Section 701 of the Nationality Act of 1940, as amended (Act of March 27, 1942 (56 Stat. 182)).

The question presented is whether the petitioner is now eligible to be naturalized under the statute cited above

relating to service in the Armed Forces of the United States during World War II, and which statute expired by its own terms on December 31, 1946.

The petitioner served honorably in the Armed Forces of the United States from January 1, 1942 to June 14, 1946. His service was with the Philippine Commonwealth Army and he enlisted in the Philippines. Petitioner was never lawfully admitted to the United States for permanent residence. Verification of his service and its honorable character has been obtained from official records.

The petitioner herein has offered no evidence to establish that he attempted to apply for or even inquired about naturalization while he was on active duty, and prior to the expiration of the law on December 31, 1946.

There are no other issues, such as good moral character or attachment to the principles of our Constitution, in this case. The sole issue is eligibility for naturalization under the provisions of the Nationality Act of 1940, as amended (supra), and under the current Immigration and Nationality Act, Section 329, (8 USC 1440).

Section 701 of the Act of March 27, 1942 sought to reward through naturalization, those *who were then serving* or who had served honorably on active duty with the Armed Forces of the United States. Section 702 of the Act (56 Stat 83) provided for the overseas naturalization of those then serving. The provisions of Sections 701 and 702 expired on December 31, 1946. During the period, designated government officials traveled to various parts of the world to examine applicants and actually confer naturalization administratively. This was the first of only two times during our nation's history that such administrative procedures were available. The Philippines was among the overseas locations visited by those officers following the recovery of those Islands by friendly forces. However, on the representations of Philippine officials, the government official was withdrawn for a period of ap-

proximately nine months, from late 1945 to mid-1946. Such a situation did not occur elsewhere. Thus, for this period, naturalization was not available to qualified servicemen then in the Philippines.

2. STATEMENT OF LAW: Section 701 of the Act of March 27, 1942 called only for honorable service in the United States Armed Forces and did not require, as does its current successor statute, Section 329 of the Immigration and Nationality Act (8 USC 1440), that the serviceman be enlisted in a qualifying geographic area or that he have been at any time lawfully admitted to the United States for permanent residence. Those geographically qualifying areas are the United States, the Canal Zone, American Samoa and Swains Island. Most, if not all, of the Filipino nationals had either enlisted in the Philippines in such units as the Philippine Scouts (part of the United States Armed Forces) or being members of the Commonwealth Army of the Philippines had been incorporated by executive and military orders into the United States Armed Forces. Others served in guerrilla units recognized by the United States Armed Forces.

Within recent years, the situation of another Filipino native and veteran of World War II was considered by the United States Supreme Court (*INS v. Marciano Haw Hibi*, 414 U.S. 5 (1973)). In *Hibi*, the Supreme Court considered the petitioner's argument that the Government was estopped from using the cut-off date of December 31, 1946 as spelled out in Section 701 of the 1940 Act since the Government, by withdrawing its examiner from the Philippines for a period of several months, had effectively denied Filipino veterans the opportunity to apply at that time. Hibi had not applied nor tried to apply prior to December 31, 1946. The Supreme Court was not persuaded by that argument.

In a split decision, the Court ruled that, since Hibi had not applied for naturalization until many years after 1946,

the withdrawal of the examiner did not rise to the level of "affirmative misconduct" required to successfully invoke estoppel against the Government. Even though the Court concluded that naturalization under Section 701 was no longer available to Hibi on the issue of estoppel, there was no hint of what the decision might have been had Hibi attempted to apply before that section's expiration.

Subsequently, a number of Filipino World War II veterans residing in San Francisco, California filed petitions for naturalization claiming eligibility under the same provision. Their petitions were joined and, notwithstanding the Supreme Court's decision in *Hibi*, the United States District Court found the majority of the 68 Filipinos eligible for naturalization under Section 701 of the Nationality Act, as amended. See *Matter of Naturalization of 68 Filipino War Veterans*, 406 F. Supp. 931 (N.D. Cal. 1975).

This Court will note that the San Francisco Court divided the 68 petitioners into three categories. In the first category were those veterans who proved to the Court that they had applied or made a reasonable effort to apply before December 31, 1946 but were denied the opportunity to file formal petitions because of the government's withdrawal of its overseas officer. The Court, distinguishing *Hibi*, found that these persons had "constructively" filed petitions and that the Government was estopped, notwithstanding *Hibi*, from now denying them naturalization.

In this first category of *68 Filipino War Veterans* seven petitioners presented evidence of affirmative misconduct by the United States Government which precluded the Government from relying on the December 31, 1946 expiration date as grounds for the denial of their applications.

Six of the seven petitioners presented evidence that they had filed the appropriate forms for naturalization and that

the applications were rejected or no action was taken. The seventh wrote to the Attorney General six months prior to his discharge and received a response that no purpose would be served by the submission of an application for naturalization.

In the second category were those veterans who convinced the Court that they would have applied had the officer not been withdrawn. These persons, like Hibi, took no steps to apply until many years later. With respect to these, the Court found that the veterans had been denied due process, an issue not raised or decided in *Hibi*. It reasoned that, since Filipinos were, before July 4, 1946, non-citizen nationals of the United States, they owed permanent allegiance to the United States. In turn, they were entitled to the protection of the United States Constitution, and thus due process.

Finally, the third category included several Filipinos who could not produce the critical proof of qualifying honorable and active service in the United States Armed Forces during the World War II period. The Court gave this group additional time within which to produce that proof. Evidence was not forthcoming and the petitions of those in the third category were dismissed.

As to categories one and two, the Government sought appeal. The appeal was grounded primarily on the fact that the petitioners' cases were not essentially distinguishable from that in *Hibi*. Briefing was completed and the appeal was awaiting oral argument in the Ninth Circuit Court of Appeals.

In a memorandum dated September 21, 1977, the Commissioner of the Immigration and Naturalization Service recommended to the Department of Justice that the appeal be withdrawn. Officials at the Department of Justice agreed and in an order dated November 30, 1977, the Court of Appeals granted the government's motion to dismiss. The order made no comment one way or the

other on the merits of the case(s). A second appeal, *In Re Avena, et al,* (9th Cir.) was withdrawn on October 11, 1979 on the authorization of the Solicitor General. The Solicitor General had decided that since those petitioners submitted their applications before November 30, 1977, when the appeal was withdrawn in *68 Filipino War Veterans*, they should then obtain the benefit of our then existing policy which was evidenced by the withdrawal of the appeal.

Upon reexamination the Government has decided to hold to the prior policy as to all applications submitted after November 30, 1977. That policy adopts the reasoning of the San Francisco Court only as to Filipino World War II veterans in the first category.

It is, however, the government's position that the naturalization of those veterans in the second category is unsupported by statute and precedent. Notwithstanding the decision in the San Francisco case, notwithstanding the government's withdrawal of its appeal in that case, and for the following reasons, the Government must recommend that this petition for naturalization be denied.

3. THE ISSUE OF 8 U.S.C. 1421(e). This petition for naturalization is based on rights allegedly created under the Nationality Act of 1940, which was repealed by the Immigration and Nationality Act of 1952. In 1961, Congress amended the 1952 Act by adding 8 U.S.C. 1421(e), which extinguished naturalization rights under prior statutes, providing:

> . . . any petition for naturalization filed on or after September 26, 1961, shall be heard and determined in accordance with the requirements of this subchapter.

This petition was not filed before November 30, 1977. Because he has not met the requirement of the current statute, 8 U.S.C. 1440, that he be lawfully admitted for permanent residence, this petitioner seeks naturalization under the provisions of the long-repealed Second War Powers Act, which provided for naturalization overseas.

Recently, in *United States v. Pasion*, 524 F. 2d 249 (9th Cir. 1975), it was held that 8 U.S.C. 1421(e) cut off any residual effects of prior naturalization laws. Under the rule of *Pasion* this petition should be denied.

In *Pasion* the petitioner was a Filipino World War II veteran who failed to file a petition for naturalization prior to December 31, 1946. He petitioned for naturalization in 1974, claiming that a 1940 statute had given him permanent residence status, and that such status was preserved by the "savings clause" in the 1952 Act. The 9th Circuit held that Section 1421(e) unambiguously cut off all rights under prior naturalization statutes, stating at pages 251 and 252:

> The statute is not ambiguous. It requires petitions for naturalization to be determined by reference to the standards currently in effect, without circumvention by application of the savings provision of Section 405(a). As appellant has never been admitted for permanent residence, and as his arguably implied status survives only by operation of Section 405(a) we are clear that Section 1421(e) forecloses reliance on that implied status to meet the requirements of 8 U.S.C. 1440. Moreover, even if Section 1421(e) were ambiguous, reference to the legislative history of the section makes clear that Congress intended to foreclose the eclectic appellee here attempts, and to impose uniform burdens upon contemporaneous petitions for naturalization. The House Judiciary Committee's Report on the bill explains: Section 17 (i.e., 8 U.S.C. Section 1421(e)) amends Section 310 of the Immigration and Nationality Act (of 1952) so as to require all petitions for naturalization filed after the enactment of this section to be heard and determined in accordance with the requirements of that act.
>
> The purpose of this amendment is to overcome interpretations placed upon the savings clause (Sec. 405 of

> the Immigration and Nationality Act (*United States v. Menasche*, 348 U.S. 528, 75 S.Ct. 513[,] 99 L.Ed. 615 (1955); *United States v. Wolff*, 270 F. 2d 422, 3 Cir., cert. den. 362 U.S. 928 (1960); *Medalion v. United States*, 279 F. 2d 162, 2 Cir. (1960), holding in effect, that residence in the United States before December 24, 1952, was sufficient to confer naturalization rights under the Nationality Act of 1940, as amended, notwithstanding its repeal on that date by the Immigration and Nationality Act. As a consequence, petitioners of this class are being considered eligible, 9 years after its repeal for naturalization under the 1940 law, and, if more favorable to the circumstances in their cases, they may elect to claim the benefits of the Immigration and Nationality Act. This, notwithstanding the fact that the petition for naturalization was not filed until after December 24, 1952, when the Immigration and Nationality Act became effective.
>
> In the opinion of the committee, such interpretations are contrary to the intent of Congress clearly indicated in the basic Immigration and Nationality Act. The administration of two nationality laws simultaneously is cumbersome, inefficient, and unfair to other applicants for naturalization. In accordance with the original purpose of the Immigration and Nationality Act, this clarifying amendment will make it amply apparent that from and after its enactment the requirements and provisions of the Immigration and Nationality Act will be uniform and will apply to all petitioners for naturalization. The Department of Justice endorses this amendment in its report of July 7, 1961, on a similar provision contained in H.R. 6300.

The *Menasche, Wolff,* and *Medalion* cases all involved hybrid claims of eligibility for naturalization under both the 1940 Nationality Act and the 1952 Immigration Act,

whereby the claimants were selectively accorded the benefits of both acts without the burdens. For example, Menasche claimed that he was entitled to credit for his period of residency in the United States prior to the 1952 Act, and that because he became a resident before the 1952 Act added the 'physical presence' requirement, he did not have to comply with it. But despite the fact that he had not filed his petition for naturalization within seven years of the date he filed his "Declaration of Intention," in which event laches would have barred his naturalization under the 1940 Act, he claimed that since the present act no longer required a declaration of intention he should be naturalized. The Supreme Court so held. In *Wolff*, the same claims were approved by the Third Circuit.

In *Medalion*, the Second Circuit admitted the petitioner to naturalization because of residence prior to the 1952 Act and waived the "physical presence" requirement despite the fact that he would have been barred from naturalization under the 1940 Act because he never filed the declaration of intention. It was the result that these petitioners were accorded the benefits of both acts, without the burdens of either—all this because of the savings clause—which the legislature undertook to correct for the future saying (*Pasion* infra, at p. 252):

> The administration of two nationality laws simultaneously is cumbersome, inefficient, and unfair to other applicants for naturalization.

Here the petitioner seeks naturalization under prior law although he has not met the December 31, 1946 filing deadline under that law. He does not meet the present statute's requirement of lawful admission for permanent residence. Whereas Pasion attempted to resurrect prior law through the savings clause, the present petitioner is using a due process claim. The result is the same—"the administration of two nationality laws simultaneously"—

which result Congress expressly intended to preclude in enacting Section 1421(e).

4. THE ISSUE OF STANDING AND LACHES: Standing is an issue, in that petitioner has failed to show that he was injured in fact by the absence of notice and the withdrawal of the Naturalization Examiner. Even if he were injured in fact he should not be given equitable relief because he waited over thirty years after the statutory deadline, and is then guilty of laches. Now to establish, that petitioner then desired to become a United States citizen, and would then have applied for naturalization, we must base our decision on only his self-serving statements of events more than thirty years ago.

In *Hibi*, the Supreme Court clearly considered the delay in filing petitions for naturalization as a prime reason for denying equitable relief. It concluded the opinion at page 9 by saying:

> Respondent's effort to claim naturalization under a statute which by its terms had expired more than 20 years before he filed his lawsuit must fail.

Although the Court did not use the world "laches," that principle was obviously what the Court had in mind at page 9.

> Laches is a neglect or failure on the part of a party in the assertion of a right, continuing for an unreasonable and unexplained length of time under circumstances permitting diligence, resulting in disadvantage to the other party. *Rank v. Krug*, 142 F. Supp. 1, 123 (S.D. Cal. 1956) affirmed in part, reversed in part on other grounds 293 F.2d 340, affirmed in part 372 U.S. 62.
>
> A court of equity will not give relief against conscience or public convenience when a party has slept on his rights. *Wagner v. Baird*, 48 U.S. 234 (1849)

Latches is a defense to equity actions which operates independently of statutes of limitations. *Russell v. Todd*, 309 U.S. 280 (1939).

Hibi did not take all the affirmative steps available to him. The same is true of this petitioner. He could have done many things prior to 1977 to assert his claimed rights under the Second War Powers Act. There is no evidence that petitioner, while on active duty, attempted to be naturalized between August, 1946 and December 31, 1946, when Mr. Phillip [*sic*] was naturalizing servicemen in the Philippines. Although Phillip [*sic*] apparently did not visit all places where veterans were located, this petitioner does not claim that he sought him out.

Although immigration quotas for the Philippines have been heavily oversubscribed since World War II, petitioner could have applied for an immigrant visa long ago. After waiting his turn for a visa he would have been eligible for naturalization immediately under Section 329 (8 U.S.C. 1440) which waives the five-year residence period ordinarily required for naturalization.

This long delay in the assertion of his alleged rights works a considerable disadvantage to the Government. It must meet claims based on legislation which expired thirty years ago and is forced to join issues of facts relating to occurrences more than thirty years ago. As a practical fact, there is no realistic way of testing the claim of this petitioner as to what happened to him in 1945-46. It is for this precise reason that stale claims are not allowed, because the mere fact of staleness destroys the effectiveness of the adversary process to arrive at the truth. Memories fade and records disappear. A very important factor respecting possible future claims of World War II veterans is that a fire, occurring on or about July 11, 1973 to July 13, 1973 at the Military Personnel Record Center in St. Louis, Missouri, destroyed millions of Army records for the period between World War I and 1959. If the petitioner prevails thousands of other Filipino war veterans will be entitled to immediate naturalization upon arrival in the United States (whether legally or illegally). Without

military personnel records to verify alleged service the Government will be confronted with an administrative nightmare. How can we separate out the false claims?

Assuming that a workable procedure can be established to determine who actually had qualifying service, how would it be possible to test the assertion, "If I'd had the opportunity for citizenship in 1945-46 I would have taken it"? There is no way of separating out those who more candidly might say, "I should have taken advantage of that opportunity for citizenship in 1945-46."

The delay of this claimant in asserting his alleged right to citizenship is unjustifiable. There are many avenues of relief open, but for unexplained reasons he did not trouble to explore or take advantage of his options. The delay has frustrated the Government and the courts in ascertaining the facts, and goes against the clear congressional policy of cutting off prior naturalization rights as of September 26, 1961. This delay not only diminishes the credibility of the claim, but under the Supreme Court's *Hibi* decision, constitutes a dispositive reason for its denial. This petitioner's effort to claim naturalization under a statute which by its terms expired more than thirty years before must fail.

3. THE ISSUE OF JUSTICIABILITY: The Supreme Court recently discussed the general issue:

> For reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government. Since decisions in these matters may implicate our relations with foreign powers and since a wide variety of classifications must be defined in the light of changing political and economic circumstances, such decisions are frequently of a character more appropriate to either the Legislative or the Executive than to the Judiciary. . . . Any rule of constitutional

> law that *would* inhibit the flexibility of the political branches of government to respond to changing world conditions should be adopted only with the greatest caution. The reasons that preclude judicial review of political questions also dictate a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization. *Mathews v. Diaz,* 426 U.S. 67, 81-82 (1976).

The withdrawal of the naturalization authority from the Philippines was the exercise of exclusive executive authority in the field of foreign policy, and is therefore not a justiciable issue, nor was the withdrawal of the naturalization authority a violation of due process under the circumstances prevailing at the time. Judge Renfrew in his *68 Filipino War Veterans* decision concluded that the conduct of the foreign relations of the United States is given by the Constitution to the executive and legislative branches of the government and the courts should decline to review the use of that political power. He decided that the Attorney General's act of withdrawing the naturalization authority from the Philippines was based, in part, on foreign policy considerations. Judge Renfrew, however, declined to find this issue non-justiciable, and it is with this conclusion that the Government disagrees. The disagreement is based on a different interpretation of the six criteria set out in *Baker v. Carr*, 369 U.S. 186 (1962), for use in determining whether a question is justiciable. Mr. Justice Brennan wrote at page 217:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial

> discretion; or the impossibility of a court's understanding [*sic*: undertaking] independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Under the *Baker* decision, if a question satisfies any one of the six criteria, it must be dismissed as non-justiciable. The Government contends that this case clearly poses a political question by most of these criteria.

The first test is if there is a textually demonstrable constitutional commitment of the issue to a coordinate political department. Article 2 Section 2 of the Constitution commits the conduct of foreign affairs to the President. Judge Renfrew acknowledged this but decided that where a case touches foreign affairs the remaining criteria of the *Baker* test should be used in deciding whether the issue is justiciable. We agree with Judge Renfrew that an issue is not beyond the court's cognizance merely because it touches on foreign policy; however, in this case foreign policy is the central issue.

By the first of the *Baker* criteria, the "textual commitment" test the issue whether the consul should or should not have naturalized Filipino veterans between October, 1945 and August, 1946 is not justiciable. The second test is whether there are "judicially discoverable and manageable standards" by which to decide the issue. Certainly a court is competent to rule on the issue of equal protection, but it cannot be called upon to ascertain or manage the standards against which to decide whether the request of a foreign government, relating to the conduct of consular affairs within its territory, should be respected or ignored. By the second of the *Baker* criteria, the issue is non-justiciable.

The third test is whether the decision would involve an "initial policy determination of a kind clearly for non-judicial discretion." The policy decision involved was not to grant citizenship rights of Filipino war veterans. The policy decision was whether or not the United States could afford to ignore the concern expressed by the Philippine Government. That issue was one of first impression and was clearly of a kind for nonjudicial discretion.

Fourth, there can be no dispute that for a court to usurp that discretion would not only express a lack of the respect due the coordinate branches of the government, but would implicitly subjugate the executive prerogative in foreign affairs to the judicial branch.

Fifth, there is a need for adherence to the political decision already made, although in this case the INS has no reservations about full inquiry into the reasons for adherence to the decision made in 1945. The reason we should adhere to that decision is that any other course of action opens the door for any veteran who did nothing to seek naturalization before December 31, 1946, but has since changed his mind, to be naturalized now, thirty-three years after his rights lapsed. No one has argued that any veteran who merely changed his mind after he had missed the deadline should now be naturalized. Nevertheless, that is precisely the effect of the San Francisco District Court's holding. Without any showing that they were interested enough to file an application or write a letter in 1945-46, applicants now could be admitted to United States citizenship and there would obviously be no obstacle as to countless thousands of veterans still in the Philippines. The immigration policies of Congress and of the INS have been formulated on the basis that the World War II veterans' rights lapsed over thirty years ago. Congress affirmatively and expressly cut off these rights in 1961. It is shown that the burdens of accommodating the large number of eligible veterans was considered in 1946 to be

overwhelming (Appx V. Exhibit 28-31). Today, each eligible veteran, if granted citizenship, will be entitled to petition for non-quota immigrant visas for his immediate relatives (See 8 U.S.C. 1151(b)). The actual number of unexpected immigrants is unknown, but it suffices to say that, in view of the difficulty absorbing the 130,000 Indochinese refugees from the Communist takeover of 1975, when these refugees were all eventually sponsored by individual United States families, an influx of a large number of unsponsored immigrants presents good reason for adherence to the past decision. The principle that the existence of legal rights does not turn on the number of persons asserting the rights, articulated by Judge Renfrew, is not helpful in deciding whether there is any policy reason for adhering to past executive decisions. There are valid reasons here.

Sixth, the passage of time does not, as Judge Renfrew decided, erase the concern of other governments that they may not be able to rely on the actions of the State Department as the United States' representative in foreign affairs. The prospect that a court can reverse foreign policy thirty years after the fact is no less unsettling than the proposition which necessarily flows from Judge Renfrew's decision, that in 1945 a court could have ordered the naturalization of foreign nationals at the United States Embassy in their country over the objections of their government.

The central issue of this case, the propriety of withdrawing the naturalization authority from the Philippines, is a political question which is not justiciable. By most, if not all, the tests set forth by the Supreme Court in *Baker v. Carr*, this issue is not a proper subject of judicial inquiry. Consequently, it was error for the San Francisco District to decide that this was a wrongful act, and to hold that this act sparked rights which survived express congressional acts to extinguish any such rights, only to burst forth thirty years later.

Four judges of the Ninth Circuit have concurred in the view that:

> The conduct at issue in *Hibi* was not the negligence or malfeasance of minor officials, but a deliberate decision of policy by the Attorney General. Although acting in the face of a contrary congressional purpose, the executive branch was attempting to advance diplomatic relations between the United States and the Philippines. Regardless of whether the Government's conduct constituted an abuse of discretion, its decisions were so patently of the type committed to the executive branch that the court was extremely reluctant to nullify them over 20 years later in order to relieve one individual instance of hardship. Choy, Circuit Judge, joined by Judges Browing, Ely, and Hufstedler, dissenting in *Santiago, et al. v. INS*, 528 F. 2d 488, 496 (9th Cir. 1975).

6. THE ISSUE OF DUE PROCESS: Judge Renfrew found the issue justiciable however and went on to find ". . . that the failure of the Government to have stationed in the Philippine Islands a representative of the INS authorized to naturalize members of the American armed forces pursuant to Section 702 of the Nationality Act of 1940 during all of the time those statutory rights were available denied petitioners due process of law." 68 *Filipino War Veterans*, supra, at 951. We argue that there was no denial of due process because the loss of the opportunity for naturalization was not the result of intentional, unjustified, invidious discrimination by the United States Government, and thus does not constitute a denial of due process. Even if the withdrawal of the naturalization authority from a given country had been the unilateral act of the United States Government, it would not constitute a denial of equal protection unless it were an intentional, arbitrary, and invidious discrimination against natives of the Philippines, without any rational basis. In this case, the

basis for the executive action was that the Philippine Government opposed the naturalization of Filipinos in the Philippines. There can be no serious argument that this does not constitute a rational basis for withdrawing the naturalization authority from the Philippines, and not from other countries. The withdrawal of the naturalization authority from the Philippines was not done for the purpose of discriminating against Filipinos. Without purposeful discrimination, there is no denial of equal protection. The due process argument seems to assume that all future petitioners would have applied for naturalization if they had the opportunity, but there is no evidence to support that assumption. The Supreme Court, in *INS v. Hibi*, 414 U.S. 5 (1973), held that neither the unavailability of a naturalization examiner, nor the failure to publicize the rights to naturalization under the Second War Powers Act constituted an equitable ground for granting a petition filed twenty years late. *A fortiori*, these omissions cannot constitute a legal basis for this relief.

Under Supreme Court decisions, the equal protection clause does not command that all persons be treated with absolute equality. It requires only that when the law draws distinctions between classes of persons, the classification bear some rational relation to a legitimate governmental purpose. *Morey v. Doud* 354 U.S. 457 (1957).

> The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. *McGowan v. Maryland*, 366 U.S. 420, 425-426 (1961).

The equal protection clause prohibits only invidious and arbitrary discrimination. *Goesaert v. Cleary*, 335 U.S. 464

(1948). The standard for federal statutes is the same. See e.g., *United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973).

Thus, in *Filipino American Veterans and Dependents Association v. United States*, 391 F. Supp. 1314 (N.D. Ca. 1974), the Court upheld a federal statute which accorded Filipinos half the monetary veterans' benefits available to other veterans. The basis for the distinction was that Congress deemed half-benefits sufficient because the cost of living is far less in the Philippines. The equal protection clause does not equalize all circumstances, it merely prohibits disparate treatment for persons in the same circumstances.

Mr. Justice Frankfurter summarized:

> The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same. *Tigner v. Texas*, 301 U.S. 141, 147 (1940)

The circumstances of this case were that the Philippine Government opposed naturalization of Filipino war veterans in the Philippines, while no other countries objected to the naturalization of their own nationals.

The circumstances of the Filipino war veterans did not pe [*sic*: permit] equal treatment. Thus, if Congress had expressly excluded Filipinos from naturalization on grounds of their government's opposition, the statutory distinction would have been unassailable. Likewise, this same distinction, drawn, as the circumstances required, by the executive branch, is no less valid, rational and reasonable. As a practical matter of foreign policy, Filipinos could not be naturalized in the Philippines. As the Supreme Court stated in *Dominio Hotel v. Arizona*, 249 U.S. 265, 268 (1919):

> The Fourteenth Amendment is not a pedagogical requirement of the impracticable.

The equal protection clause does not prohibit the unavoidable, rational, and reasonable basis for the distinction drawn in this case.

In this case, it is not argued that the statute is discriminatory, but that it was discriminatorily applied by the executive agency empowered to give it effect. The Government has no argument with the principle that:

> Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as to make unjust and illegal discrimination between persons under similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution. *Yick Wo v. Hopkins*, 118 U.S. 356, 373-374 (1886).

However, in the case of allegedly discriminatory *executive* action, a requirement of purposeful and intentional discrimination is added to the requirement that the classification be without rational basis.

The "rational basis" test applies to distinctions drawn by the executive, just as it does to those drawn by the legislature.

> (T)he conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation. *Olyer v. Boles*, 368 U.S. 456 (1962)

Relying on the *Olyer* case, the Ninth Circuit found no violation of equal protection as incorporated in the Fifth Amendment's due process clause on a criminal defendant's allegations of selective prosecution. In *United States v. Sacco*, 428 F.2d 264 (9th Cir. 1970), the Court, finding that the decision to investigate and prosecute the defendant under the alien registration law was based on his suspected role in organized crime, held that this was rational basis for the executive decision.

The landmark *Yick Wo* case involved a San Francisco ordinance prohibiting the operation of a laundry in wooden buildings without the "consent of the board of supervisors." The board had denied applications from Yick Wo and some 200 of 230 Chinese who had been operating their laundries in their wooden buildings for upwards of twenty years, while it had approved the applications of eighty Caucasians and denied only one. The Court held the board's action to have denied equal protection of the laws to Yick Wo, who had been jailed for operating a laundry in a wooden building without the board's consent.

The Court's holding is squarely upon discriminatory administrative action, and does not reach the question whether the ordinance was unconstitutional.

> In the present cases, we are not obliged to reason from the probable to the actual, and pass upon the validity of the ordinances complained of, as tried merely by the opportunities which their terms afford of unequal and unjust discrimination in their administration; for the cases present the ordinances in actual operation and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant the conclusion that, whatever may have been the intent of the ordinance as adopted, they are applied by the public authorities charged with their administration, and thus representing the state itself, with a mind so unequal and oppressive as to amount to a practical denial by the state of . . . equal protection of the laws. *Yick Wo v. Hopkins*, at 373.

The language of the *Yick Wo* decision strongly suggests that if the alleged discrimination is in the administration of a facially non-discriminatory statute, it must be shown to be purposeful or intentional. The opinion speaks in

terms of "an evil eye and an unequal hand," "unequal and unjust discrimination," and "a mind (which is) unequal and oppressive."

In *Snowden v. Hughes*, 321 U.S. 1, 8 (1944), the Court stated unequivocally:

> The unequal [*sic*: unlawful] administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in its [*sic*] an element of intentional or purposeful discrimination.

The Ninth Circuit and the other courts of appeals have repeatedly held that there must be a purpose to discriminate. *Williams v. Field*, 416 F. 2d 483, 486 (9th Cir. 1969); *Hoffman v. Holden* 268 F. 2d 280, 290 (9th Cir. 1959); *United States v. Falk*, 479 F. 2d 616, 619 (7th Cir. 1973) en banc; *Friedlander v. Cimino*, 520 F. 2d 318, 320 (2nd Cir. 1975); *Hawkins v. Town of Shaw, Mississippi*, 461 F.2d 1171, 1173 (5th Cir. 1972); *Tollett v. Laman*, 497 F. 2d 1231 (8th Cir. 1974); *Robinson v. McCorkle*, 462 F. 2d 111 (3rd Cir. 1972).

In this case, it is clear that the withdrawal of the naturalization authority was not done *for the purpose* of discriminating against Filipino war veterans. The facts strongly indicate the contrary.

At page 18 of the deposition of former INS Commissioner Ugo Carusi, taken by Donald L. Ungar on February 24, 1974 in connection with the *68 Veterans* case (Appx. VI, page 18), Mr. Ungar [*sic*: the examiner] asked

> Q. Now, in withdrawing the designation of the examiner in the Philippines, was there ever any factor that entered into your consideration such as prejudice against the Philippines race or any type of conspiracy that you know of to keep these people from coming to the United States as Americans?

Mr. Carusi answered:

> A. No. If there had been, I wouldn't have countenanced it.

If the INS had harbored a purpose to deprive Filipino veterans of their naturalization, it is impossible to explain why the United States Consul in Manila was originally given the naturalization authority in August, 1945. If the withdrawal of the naturalization authority in October, 1945 was done with a purpose to discriminate against Filipinos, the restoration of the authority in August, 1946 was a self-defeating act. A report prepared by INS for the War Department dated June 30, 1945 clearly shows that Filipino war veterans outside the Philippines were treated the same as all other war veterans. The tables show that 6,842 Filipino members of the American Armed Forces had been naturalized between 1942 and 1945. This figure was reached before naturalization had begun in the Philippines. Only a few countries had a higher number of their citizens that became naturalized American citizens (APPX V11).

Certainly, there is no evidence to support that the effect on Filipinos was purposeful which is essential to a conclusion that the executive authority has violated the equal protection guarantee. Judge Renfrew did not consider this defect in the *68 Veterans* case because he dealt with the case in terms of its involving an inherently suspect classification based on national origin. There are two errors in Judge Renfrew's application of this approach.

First, he disregarded the fact that designating the classification as "suspect" is merely the means to an end—deciding whether the classification is reasonably related to a legitimate government purpose. The Supreme Court's repeated admonitions that certain classifications will be subject to severe scrutiny means that it will make an independent judgment on the "rational basis" question.

For example, in *King v. Saddleback Junior College District*, 445 F. 2d 932 (9th Cir. 1971), the Ninth Circuit upheld school board regulations on the length of male students' hair. The board had the statutory power to promulgate regulations to maintain order in the schools. The board's premise was that long hair was disruptive of order, and the court held that, given that premise, the half-length regulation was a rational means to attaining order, a legitimate governmental purpose. The point of the case is that where the classification is not "suspect," the courts will not examine the soundness of the premise. If, however, the regulation had involved a "suspect classification," the court would have more closely examined the validity of the premise and the legitimacy of the governmental purpose. This is precisely what the Supreme Court did in *Hirabayashi v. U.S.*, 320 U.S. 81 (1943); *Korematau* [*sic*] v. U.S., 323 U.S. 214 (1944); *Oyama v. California*, 332 U.S. 633 (1948); *Takahashi v. Fish Commission*, 334 U.S. 413 (1948); *Graham v. Richardson*, 403 U.S. 365 (1971); *Sugarman v. Dougall*, 413 U.S. 634 (1973); and *In re Griffiths*, 413 U.S. 717 (1973). However, the facts of the instant case obviate the need for the "suspect classification" analysis because the distinction is clearly rational on its face. The INS did not maintain a naturalization authority in the only country which objected to it.

The second reason the "suspect classification" analysis is not appropriate in this case is, as we have stated, there was *no purpose* on the part of the INS to draw distinctions disfavoring veterans of Philippine nationality. The only purpose in this case was the purpose of the Philippine Government to retain the finest of its male population. In the traditional "suspect classification" analysis, the first step is to ascertain the government's purpose. The second is to determine whether this purpose is legitimate. The third is to determine what reason the government gives for

drawing the distinctions between classes of individuals. The final step is to determine whether the classification bears a rational relation to the purpose. As applied to this case, this analysis breaks down at every step.

First there was no purpose to exclude Filipinos from the benefits of the Act. Thus, there can be no issue of the legitimacy of such purpose. The INS did not single out Filipinos for disparate treatment; their government did. Since the INS did not draw the distinction, there can be no meaningful analysis whether it was a rational distinction for the INS to draw. Every case cited by Judge Renfrew involves a situation where the legislature or executive *actively undertook to establish* the suspect classification. It is only in that context that the ordinary equal protection analysis is applicable. In this case, the analysis must stop when it is determined that the government had no purpose to discriminate against Filipinos. This conclusion brings us full circle to the inevitable correctness of the rule of *Snowden v. Hughes*, supra, that where the alleged discrimination is in the execution, rather than in the enactment of a statute, there must be proof that the alleged discrimination is intentional and purposeful. In this case there is no evidence of purposeful arbitrary discrimination. Thus the petitioner has not been deprived of due process by any discriminatory act of the United States Government. For this reason, there is no basis for granting the belated naturalization of a petitioner who did not seek naturalization before December 31, 1946.

Further, the situation of category two veterans is indeed indistinguishable from that in *Hibi* (supra). Since no attempt was made to inquire or apply prior to December 31, 1946, the government's failure to have an examiner in the Philippines did not amount to the "affirmative misconduct" necessary to invoke estoppel, nor was it a denial of due process.

Thus it is the position of the Government that naturalization under Section 701 of the Nationality Act of 1940 is not available to a Filipino World War II veteran who cannot prove that he made a reasonable inquiry or application prior to the expiration of the above section on December 31, 1946.

7. FINDINGS OF FACT AND CONCLUSIONS OF LAW: Pursuant to the provisions of Section 385 of the Immigration and Nationality Act (8 USC 1446), I hereby make the following findings of fact and conclusions of law.

FINDINGS OF FACT

(a) The petitioner filed a petition for naturalization on June 19, 1978 under the provisions of Section 701 of the Nationality Act of 1940, as amended;
(b) The petitioner is a Filipino national who served honorably on active duty with Armed Forces of the United States from January 1, 1942 to June 14, 1946 by reason of his service in the Philippine Commonwealth Army during that period; he was enlisted in the Philippines;
(c) The petitioner is not a lawful permanent resident of the United States;
(d) The petitioner has offered no evidence to show that he made an effort to become naturalized while on active duty or applied for naturalization prior to December 31, 1946.

CONCLUSIONS OF LAW

(a) The withdrawal of the naturalization authority from the Philippines was the exercise of exclusive executive authority in the field of foreign policy and is therefore not a justiciable issue.
(b) The petitioner is ineligible for naturalization under the provisions of Section 701 and 702 of the

Nationality Act of 1940 as amended because of the decision of the United States Supreme Court in *INS v. Hibi*, 414 U.S. 5 (1973), and because of current Section 310(e) of the Immigration and Nationality Act, as amended (8 USC 1421(e)), notwithstanding the decision of the United States District Court, San Francisco, California in *Matter of Naturalization of 68 Filipino War Veterans*, 406 F. Supp. 931 (N.D. Cal. 1975).

(c) The petitioner has failed to show that he was injured in fact by the absence of notice and the withdrawal of the naturalization examiner, and even if he had been injured he should be barred by the principle of laches from receiving equitable relief because he waited over thirty years after the statutory deadline.

8. RECOMMENDATION OF THE DESIGNATED EXAMINER: I recommend that this petition for naturalization be DENIED pursuant to the facts and law outlined above.

Respectfully submitted,

/s/ ALLEN B.P. LEE
General Attorney (Nationality)
Designated Naturalization
Examiner

[Aug. 7, 1980]
(Date)

[Appendices Omitted]

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE NORTHERN DISTRICT OF CALIFORNIA AT SAN FRANCISCO, CALIFORNIA

Petition No. 257890

PETITION FOR NATURALIZATION

OF

PANFILO JABALDE

FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATIONS OF DESIGNATED NATURALIZATION EXAMINER

TO THE HONORABLE, THE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE NORTHERN DISTRICT OF CALIFORNIA:

1. **PRELIMINARY STATEMENT:** The undersigned, duly designated under the Immigration and Nationality Act to conduct preliminary examinations upon petitions for naturalization, respectfully submits that the above-named petitioner, a native and national of the Philippines, age 60 years, presently in the United States in the status of visitor, filed the petition for naturalization numbered above on February 26, 1979, under Section 701 of the Nationality Act of 1940, as amended (Act of March 27, 1942 (56 Stat. 182)).

The question presented is whether the petitioner is now eligible to be naturalized under the statute cited above

relating to service in the Armed Forces of the United States during World War II, and which statute expired by its own terms on December 31, 1946.

The petitioner served honorably in the Armed Forces of the United States from December 1, 1943 to June 30, 1946. His service was with the Philippine Commonwealth Army and he enlisted in the Philippines. Petitioner was never lawfully admitted to the United States for permanent residence. Verification of his service and its honorable character has been obtained from official records.

The petitioner herein has offered no evidence to establish that he attempted to apply for or even inquired about naturalization while he was on active duty, and prior to the expiration of the law on December 31, 1946.

* * * * *

[Legal Discussion Omitted]

FINDINGS OF FACT

(a) The petitioner filed a petition for naturalization on February 26, 1979 under the provisions of Section 701 of the Nationality Act of 1940, as amended;
(b) The petitioner is a Filipino national who served honorably on active duty with Armed Forces of the United States from December 1, 1943 to June 30, 1946 by reason of his service in the Philippine Commonwealth Army during that period; he was enlisted in the Philippines;
(c) The petitioner is not a lawful permanent resident of the United States;
(d) The petitioner has offered no evidence to show that he made an effort to become naturalized while on active duty or applied for naturalization prior to December 31, 1946.

* * * * *

8. RECOMMENDATION OF THE DESIGNATED EXAMINER: I recommend that this petition for naturalization be DENIED pursuant to the facts and law outlined above.

Respectfully submitted,

/s/ ALLEN B.P. LEE
General Attorney (Nationality)
Designated Naturalization
Examiner

[Aug. 7, 1980]
(Date)

[Appendices Omitted]

IN THE DISTRICT COURT OF THE UNITED STATES
IN AND FOR THE NORTHERN
DISTRICT OF CALIFORNIA
AT SAN FRANCISCO, CALIFORNIA

Petition No. 257893

PETITION FOR NATURALIZATION

OF

FIDEL ZOSIMO USI CANILAO

**FINDINGS OF FACT,
CONCLUSIONS OF LAW AND RECOMMENDATIONS
OF DESIGNATED NATURALIZATION EXAMINER**

TO THE HONORABLE, THE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE NORTHERN DISTRICT OF CALIFORNIA:

1. PRELIMINARY STATEMENT: The undersigned, duly designated under the Immigration and Nationality Act to conduct preliminary examinations upon petitions for naturalization, respectfully submits that the above-named petitioner, a native and national of the Philippines, age 62 years, presently in the United States in the status of visitor, filed the petition for naturalization numbered above on February 26, 1979, under Section 701 of the Nationality Act of 1940, as amended (Act of March 27, 1942 (56 Stat. 182)).

The question presented is whether the petitioner is now eligible to be naturalized under the statute cited above

relating to service in the Armed Forces of the United States during World War II, and which statute expired by its own terms on December 31, 1946.

The petitioner served honorably in the Armed Forces of the United States from September 1, 1941 to February 15, 1946. His service was with the Philippine Commonwealth Army and he enlisted in the Philippines. Petitioner was never lawfully admitted to the United States for permanent residence. Verification of his service and its honorable character has been obtained from official records.

The petitioner herein has offered no evidence to establish that he attempted to apply for or even inquired about naturalization while he was on active duty, and prior to the expiration of the law on December 31, 1946.

• • • • •

[Legal Discussion Omitted]

FINDINGS OF FACT

(a) The petitioner filed a petition for naturalization on February 26, 1979 under the provisions of Section 701 of the Nationality Act of 1940, as amended;
(b) The petitioner is a Filipino national who served honorably on active duty with Armed Forces of the United States from September 1, 1941 to February 15, 1946 by reason of his service in the Philippine Commonwealth Army during that period; he was enlisted in the Philippines;
(c) The petitioner is not a lawful permanent resident of the United States;
(d) The petitioner has offered no evidence to show that he made an effort to become naturalized while on active duty or applied for naturalization prior to December 31, 1946.

• • • • •

8. RECOMMENDATION OF THE DESIGNATED EXAMINER: I recommend that this petition for naturalization be DENIED pursuant to the facts and law outlined above.

Respectfully submitted,

/s/ ALLEN B.P. LEE
General Attorney (Nationality)
Designated Naturalization
Examiner

[Aug. 7, 1980]
(Date)

[Appendices Omitted]

IN THE DISTRICT COURT OF THE UNITED STATES
IN AND FOR THE NORTHERN
DISTRICT OF CALIFORNIA
AT SAN FRANCISCO, CALIFORNIA

Petition No. 257939

PETITION FOR NATURALIZATION

OF

ANTONIO PATDO TANTAY

**FINDINGS OF FACT,
CONCLUSIONS OF LAW AND RECOMMENDATIONS
OF DESIGNATED NATURALIZATION EXAMINER**

TO THE HONORABLE, THE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE NORTHERN DISTRICT OF CALIFORNIA:

1. PRELIMINARY STATEMENT: The undersigned, duly designated under the Immigration and Nationality Act to conduct preliminary examinations upon petitions for naturalization, respectfully submits that the above-named petitioner, a native and national of the Philippines, age 60 years, presently in the United States in the status of visitor, filed the petition for naturalization numbered above on February 26, 1979, under Section 701 of the Nationality Act of 1940, as amended (Act of March 27, 1942 (56 Stat. 182)).

The question presented is whether the petitioner is now eligible to be naturaliz. l under the statute cited above

relating to service in the Armed Forces of the United States during World War II, and which statute expired by its own terms on December 31, 1946.

The petitioner served honorably in the Armed Forces of the United States from March 14, 1945 to June 30, 1946. His service was with the Philippine Scouts and he enlisted in the Philippines. Petitioner was never lawfully admitted to the United States for permanent residence. Verification of his service and its honorable character has been obtained from official records.

The petitioner herein has offered no evidence to establish that he attempted to apply for or even inquired about naturalization while he was on active duty, and prior to the expiration of the law on December 31, 1946.

• • • • •

[Legal Discussion Omitted]

FINDINGS OF FACT

(a) The petitioner filed a petition for naturalization on February 26, 1979 under the provisions of Section 701 of the Nationality Act of 1940, as amended;
(b) The petitioner is a Filipino national who served honorably on active duty with Armed Forces of the United States from March 14, 1945 to June 30, 1946 by reason of his service in the Philippine Scouts during that period; he was enlisted in the Philippines;
(c) The petitioner is not a lawful permanent resident of the United States;
(d) The petitioner has offered no evidence to show that he made an effort to become naturalized while on active duty or applied for naturalization prior to December 31, 1946.

• • • • •

8. RECOMMENDATION OF THE DESIGNATED EXAMINER: I recommend that this petition for naturalization be DENIED pursuant to the facts and law outlined above.

Respectfully submitted,

/s/ ALLEN B.P. LEE
General Attorney (Nationality)
Designated Naturalization
Examiner

[Aug. 7, 1980]
(Date)

[Appendices omitted]

IN THE DISTRICT COURT OF THE UNITED STATES
IN AND FOR THE NORTHERN
DISTRICT OF CALIFORNIA
AT SAN FRANCISCO, CALIFORNIA

Petition No. 257943

PETITION FOR NATURALIZATION

OF

ARCADIO REVILLA NEPOMUCENO

**FINDINGS OF FACT,
CONCLUSIONS OF LAW AND RECOMMENDATIONS
OF DESIGNATED NATURALIZATION EXAMINER**

TO THE HONORABLE, THE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE NORTHERN DISTRICT OF CALIFORNIA:

1. PRELIMINARY STATEMENT: The undersigned, duly designated under the Immigration and Nationality Act to conduct preliminary examinations upon petitions for naturalization, respectfully submits that the above-named petitioner, a native and national of the Philippines, age 63 years, presently in the United States in the status of visitor, filed the petition for naturalization numbered above on February 26, 1979, under Section 701 of the Nationality Act of 1940, as amended (Act of March 27, 1942 (56 Stat. 182)).

The question presented is whether the petitioner is now eligible to be naturalized under the statute cited above

relating to service in the Armed Forces of the United States during World War II, and which statute expired by its own terms on December 31, 1946.

The petitioner served honorably in the Armed Forces of the United States from November 24, 1941 to February 12, 1946. His service was with the Philippine Commonwealth Army and he enlisted in the Philippines. Petitioner was never lawfully admitted to the United States for permanent residence. Verification of his service and its honorable character has been obtained from official records.

The petitioner herein has offered no evidence to establish that he attempted to apply for or even inquired about naturalization while he was on active duty, and prior to the expiration of the law on December 31, 1946.

* * * * *

[Legal Discussion Omitted]

FINDINGS OF FACT

(a) The petitioner filed a petition for naturalization on February 26, 1979 under the provisions of Section 701 of the Nationality Act of 1940, as amended;
(b) The petitioner is a Filipino national who served honorably on active duty with Armed Forces of the United States from November 24, 1941 to February 12, 1946 by reason of his service in the Philippine Commonwealth Army during that period; he was enlisted in the Philippines;
(c) The petitioner is not a lawful permanent resident of the United States;
(d) The petitioner has offered no evidence to show that he made an effort to become naturalized while on active duty or applied for naturalization prior to December 31, 1946.

* * * * *

8. RECOMMENDATION OF THE DESIGNATED EXAMINER: I recommend that this petition for naturalization be DENIED pursuant to the facts and law outlined above.

Respectfully submitted,

/s/ ALLEN B.P. LEE
General Attorney (Nationality)
Designated Naturalization
Examiner

[Aug. 7, 1980]
(Date)

[Appendices Omitted]

IN THE DISTRICT COURT OF THE UNITED STATES
IN AND FOR THE NORTHERN
DISTRICT OF CALIFORNIA
AT SAN FRANCISCO, CALIFORNIA

Petition No. 259187

PETITION FOR NATURALIZATION

OF

DIONISIO VALLEJOS LUCAS

**FINDINGS OF FACT,
CONCLUSIONS OF LAW AND RECOMMENDATIONS
OF DESIGNATED NATURALIZATION EXAMINER**

TO THE HONORABLE, THE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE NORTHERN DISTRICT OF CALIFORNIA:

1. PRELIMINARY STATEMENT: The undersigned, duly designated under the Immigration and Nationality Act to conduct preliminary examinations upon petitions for naturalization, respectfully submits that the above-named petitioner, a native and national of the Philippines, age 63 years, presently in the United States in the status of visitor, filed the petition for naturalization numbered above on April 23, 1979, under Section 701 of the Nationality Act of 1940, as amended (Act of March 27, 1942 (56 Stat. 182)).

The question presented is whether the petitioner is now eligible to be naturalized under the statute cited above

relating to service in the Armed Forces of the United States during World War II, and which statute expired by its own terms on December 31, 1946.

The petitioner served honorably in the Armed Forces of the United States from December 19, 1941 to June 16, 1946. His service was with the Philippine Commonwealth Army and he enlisted in the Philippines. Petitioner was never lawfully admitted to the United States for permanent residence. Verification of his service and its honorable character has been obtained from official records.

The petitioner herein has offered no evidence to establish that he attempted to apply for or even inquired about naturalization while he was on active duty, and prior to the expiration of the law on December 31, 1946.

* * * * *

[Legal Discussion Omitted]

FINDINGS OF FACT

(a) The petitioner filed a petition for naturalization on April 23, 1979 under the provisions of Section 701 of the Nationality Act of 1940, as amended;
(b) The petitioner is a Filipino national who served honorably on active duty with Armed Forces of the United States from December 19, 1941 to June 16, 1946 by reason of his service in the Philippine Commonwealth Army during that period; he was enlisted in the Philippines;
(c) The petitioner is not a lawful permanent resident of the United States;
(d) The petitioner has offered no evidence to show that he made an effort to become naturalized while on active duty or applied for naturalization prior to December 31, 1946.

* * * * *

8. RECOMMENDATION OF THE DESIGNATED EXAMINER: I recommend that this petition for naturalization be DENIED pursuant to the facts and law outlined above.

Respectfully submitted,

/s/ ALLEN B.P. LEE
General Attorney (Nationality)
Designated Naturalization
Examiner

[Aug. 7, 1980]
(Date)

[Appendices Omitted]

IN THE DISTRICT COURT OF THE UNITED STATES
IN AND FOR THE NORTHERN
DISTRICT OF CALIFORNIA
AT SAN FRANCISCO, CALIFORNIA

Petition No. 259822

PETITION FOR NATURALIZATION

OF

OLIVER JUAN POSADAS -

**FINDINGS OF FACT,
CONCLUSIONS OF LAW AND RECOMMENDATIONS
OF DESIGNATED NATURALIZATION EXAMINER**

TO THE HONORABLE, THE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE NORTHERN DISTRICT OF CALIFORNIA:

1. PRELIMINARY STATEMENT: The undersigned, duly designated under the Immigration and Nationality Act to conduct preliminary examinations upon petitions for naturalization, respectfully submits that the above-named petitioner, a native and national of the Philippines, age 60 years, presently in the United States in the status of visitor, filed the petition for naturalization numbered above on May 23, 1979, under Section 701 of the Nationality Act of 1940, as amended (Act of March 27, 1942 (56 Stat. 182)).

The question presented is whether the petitioner is now eligible to be naturalized under the statute cited above

relating to service in the Armed Forces of the United States during World War II, and which statute expired by its own terms on December 31, 1946.

The petitioner served honorably in the Armed Forces of the United States from September 1, 1941 to May 14, 1946. His service was with the Philippine Commonwealth Army and he enlisted in the Philippines. Petitioner was never lawfully admitted to the United States for permanent residence. Verification of his service and its honorable character has been obtained from official records.

The petitioner herein has offered no evidence to establish that he attempted to apply for or even inquired about naturalization while he was on active duty, and prior to the expiration of the law on December 31, 1946.

* * * * *

[Legal Discussion Omitted]

FINDINGS OF FACT

(a) The petitioner filed a petition for naturalization on May 23, 1979 under the provisions of Section 701 of the Nationality Act of 1940, as amended;
(b) The petitioner is a Filipino national who served honorably on active duty with Armed Forces of the United States from September 1, 1941 to January 14, 1946 by reason of his service in the Philippine Commonwealth Army during that period; he was enlisted in the Philippines;
(c) The petitioner is not a lawful permanent resident of the United States;
(d) The petitioner has offered no evidence to show that he made an effort to become naturalized while on active duty or applied for naturalization prior to December 31, 1946.

* * * * *

8. RECOMMENDATION OF THE DESIGNATED EXAMINER: I recommend that this petition for naturalization be DENIED pursuant to the facts and law outlined above.

Respectfully submitted,

/s/ ALLEN B.P. LEE
General Attorney (Nationality)
Designated Naturalization
Examiner

[Aug. 7, 1980]
(Date)

[Appendices Omitted]

IN THE DISTRICT COURT OF THE UNITED STATES
IN AND FOR THE NORTHERN
DISTRICT OF CALIFORNIA
AT SAN FRANCISCO, CALIFORNIA

Petition No. 267623

PETITION FOR NATURALIZATION

OF

VICENTE MIRANDA BELIZARIO

**FINDINGS OF FACT,
CONCLUSIONS OF LAW AND RECOMMENDATIONS
OF DESIGNATED NATURALIZATION EXAMINER**

TO THE HONORABLE, THE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE NORTHERN DISTRICT OF CALIFORNIA:

1. PRELIMINARY STATEMENT: The undersigned, duly designated under the Immigration and Nationality Act to conduct preliminary examinations upon petitions for naturalization, respectfully submits that the above-named petitioner, a native and national of the Philippines, age 72 years, presently in the United States in the status of visitor, filed the petition for naturalization numbered above on March 28, 1980, under Section 701 of the Nationality Act of 1940, as amended (Act of March 27, 1942 (56 Stat. 182)).

The question presented is whether the petitioner is now eligible to be naturalized under the statute cited above

relating to service in the Armed Forces of the United States during World War II, and which statute expired by its own terms on December 31, 1946.

The petitioner served honorably in the Armed Forces of the United States from December 19, 1941 to June 30, 1946. His service was with the Philippine Commonwealth Army and he enlisted in the Philippines. Petitioner was never lawfully admitted to the United States for permanent residence. Verification of his service and its honorable character has been obtained from official records.

The petitioner herein has offered no evidence to establish that he attempted to apply for or even inquired about naturalization while he was on active duty, and prior to the expiration of the law on December 31, 1946.

• • • • •

[Legal Discussion Omitted]

FINDINGS OF FACT

(a) The petitioner filed a petition for naturalization on March 28, 1980 under the provisions of Section 701 of the Nationality Act of 1940, as amended;
(b) The petitioner is a Filipino national who served honorably on active duty with Armed Forces of the United States from December 19, 1941 to June 30, 1946 by reason of his service in the Philippine Commonwealth Army during that period; he was enlisted in the Philippines;
(c) The petitioner is not a lawful permanent resident of the United States;
(d) The petitioner has offered no evidence to show that he made an effort to become naturalized while on active duty or applied for naturalization prior to December 31, 1946.

• • • • •

8. RECOMMENDATION OF THE DESIGNATED EXAMINER: I recommend that this petition for naturalization be DENIED pursuant to the facts and law outlined above.

Respectfully submitted,

/s/ ALLEN B.P. LEE
General Attorney (Nationality)
Designated Naturalization
Examiner

[Aug. 7, 1980]
(Date)

[Appendices Omitted]

IN THE DISTRICT COURT OF THE UNITED STATES
IN AND FOR THE NORTHERN
DISTRICT OF CALIFORNIA
AT SAN FRANCISCO, CALIFORNIA

Petition No. 267645

PETITION FOR NATURALIZATION

OF

RODOLFO DE JESUS BATAC

**FINDINGS OF FACT,
CONCLUSIONS OF LAW AND RECOMMENDATIONS
OF DESIGNATED NATURALIZATION EXAMINER**

TO THE HONORABLE, THE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE NORTHERN DISTRICT OF CALIFORNIA:

1. PRELIMINARY STATEMENT: The undersigned, duly designated under the Immigration and Nationality Act to conduct preliminary examinations upon petitions for naturalization, respectfully submits that the above-named petitioner, a native and national of the Philippines, age 55 years, presently in the United States in the status of visitor, filed the petition for naturalization numbered above on March 28, 1980, under Section 701 of the Nationality Act of 1940, as amended (Act of March 27, 1942 (56 Stat. 182)).

The question presented is whether the petitioner is now eligible to be naturalized under the statute cited above

relating to service in the Armed Forces of the United States during World War II, and which statute expired by its own terms on December 31, 1946.

The petitioner served honorably in the Armed Forces of the United States from June 11, 1945 to December 26, 1945. His service was with the Philippine Commonwealth Army and he enlisted in the Philippines. Petitioner was never lawfully admitted to the United States for permanent residence. Verification of his service and its honorable character has been obtained from official records.

The petitioner herein has offered no evidence to establish that he attempted to apply for or even inquired about naturalization while he was on active duty, and prior to the expiration of the law on December 31, 1946.

• • • • •

[Legal Discussion Omitted]

FINDINGS OF FACT

(a) The petitioner filed a petition for naturalization on March 28, 1980 under the provisions of Section 701 of the Nationality Act of 1940, as amended;
(b) The petitioner is a Filipino national who served honorably on active duty with Armed Forces of the United States from June 11, 1945 to December 26, 1945 by reason of his service in the Philippine Commonwealth Army during that period; he was enlisted in the Philippines;
(c) The petitioner is not a lawful permanent resident of the United States;
(d) The petitioner has offered no evidence to show that he made an effort to become naturalized while on active duty or applied for naturalization prior to December 31, 1946.

• • • • •

8. RECOMMENDATION OF THE DESIGNATED EXAMINER: I recommend that this petition for naturalization be DENIED pursuant to the facts and law outlined above.

Respectfully submitted,

/s/ ALLEN B.P. LEE
General Attorney (Nationality)
Designated Naturalization
Examiner

[Aug. 7, 1980]
(Date)

[Appendices Omitted]

IN THE DISTRICT COURT OF THE UNITED STATES
IN AND FOR THE NORTHERN
DISTRICT OF CALIFORNIA
AT SAN FRANCISCO, CALIFORNIA

Petition No. 267654

PETITION FOR NATURALIZATION

OF

PEDRO DUMLAO PONCIANO

**FINDINGS OF FACT,
CONCLUSIONS OF LAW AND RECOMMENDATIONS
OF DESIGNATED NATURALIZATION EXAMINER**

TO THE HONORABLE, THE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE NORTHERN DISTRICT OF CALIFORNIA:

1. PRELIMINARY STATEMENT: The undersigned, duly designated under the Immigration and Nationality Act to conduct preliminary examinations upon petitions for naturalization, respectfully submits that the above-named petitioner, a native and national of the Philippines, age 75 years, presently in the United States in the status of visitor, filed the petition for naturalization numbered above on March 28, 1980, under Section 701 of the Nationality Act of 1940, as amended (Act of March 27, 1942 (56 Stat. 182)).

The question presented is whether the petitioner is now eligible to be naturalized under the statute cited above

relating to service in the Armed Forces of the United States during World War II, and which statute expired by its own terms on December 31, 1946.

The petitioner served honorably in the Armed Forces of the United States from November 2, 1943 to June 30, 1946. His service was with the Philippine Commonwealth Army and he enlisted in the Philippines. Petitioner was never lawfully admitted to the United States for permanent residence. Verification of his service and its honorable character has been obtained from official records.

The petitioner herein has offered no evidence to establish that he attempted to apply for or even inquired about naturalization while he was on active duty, and prior to the expiration of the law on December 31, 1946.

* * * * *

[Legal Discussion Omitted]

FINDINGS OF FACT

(a) The petitioner filed a petition for naturalization on March 28, 1980 under the provisions of Section 701 of the Nationality Act of 1940, as amended;
(b) The petitioner is a Filipino national who served honorably on active duty with Armed Forces of the United States from November 2, 1943 to June 30, 1946 by reason of his service in the Philippine Commonwealth Army during that period; he was enlisted in the Philippines;
(c) The petitioner is not a lawful permanent resident of the United States;
(d) The petitioner has offered no evidence to show that he made an effort to become naturalized while on active duty or applied for naturalization prior to December 31, 1946.

* * * * *

8. RECOMMENDATION OF THE DESIGNATED EXAMINER: I recommend that this petition for naturalization be DENIED pursuant to the facts and law outlined above.

Respectfully submitted,

/s/ ALLEN B.P. LEE
General Attorney (Nationality)
Designated Naturalization
Examiner

[Aug. 7, 1980]
(Date)

[Appendices Omitted]

IN THE DISTRICT COURT OF THE UNITED STATES
IN AND FOR THE NORTHERN
DISTRICT OF CALIFORNIA
AT SAN FRANCISCO, CALIFORNIA

Petition No. 268252

PETITION FOR NATURALIZATION

OF

CESAR JOCSON ASCALON

**FINDINGS OF FACT,
CONCLUSIONS OF LAW AND RECOMMENDATIONS
OF DESIGNATED NATURALIZATION EXAMINER**

TO THE HONORABLE, THE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE NORTHERN DISTRICT OF CALIFORNIA:

1. PRELIMINARY STATEMENT: The undersigned, duly designated under the Immigration and Nationality Act to conduct preliminary examinations upon petitions for naturalization, respectfully submits that the above-named petitioner, a native and national of the Philippines, age 56 years, presently in the United States in the status of visitor, filed the petition for naturalization numbered above on April 18, 1980, under Section 701 of the Nationality Act of 1940, as amended (Act of March 27, 1942 (56 Stat. 182)).

The question presented is whether the petitioner is now eligible to be naturalized under the statute cited above

relating to service in the Armed Forces of the United States during World War II, and which statute expired by its own terms on December 31, 1946.

The petitioner served honorably in the Armed Forces of the United States from July 6, 1942 to March 23, 1946. His service was with the Philippine Commonwealth Army and he enlisted in the Philippines. Petitioner was never lawfully admitted to the United States for permanent residence. Verification of his service and its honorable character has been obtained from official records.

The petitioner herein has offered no evidence to establish that he attempted to apply for or even inquired about naturalization while he was on active duty, and prior to the expiration of the law on December 31, 1946.

* * * * *

[Legal Discussion Omitted]

FINDINGS OF FACT

(a) The petitioner filed a petition for naturalization on April 18, 1980 under the provisions of Section 701 of the Nationality Act of 1940, as amended;
(b) The petitioner is a Filipino national who served honorably on active duty with Armed Forces of the United States from July 6, 1942 to March 23, 1946 by reason of his service in the Philippine Commonwealth Army during that period; he was enlisted in the Philippines;
(c) The petitioner is not a lawful permanent resident of the United States;
(d) The petitioner has offered no evidence to show that he made an effort to become naturalized while on active duty or applied for naturalization prior to December 31, 1946.

* * * * *

8. RECOMMENDATION OF THE DESIGNATED EXAMINER: I recommend that this petition for naturalization be DENIED pursuant to the facts and law outlined above.

Respectfully submitted,

/s/ ALLEN B.P. LEE
General Attorney (Nationality)
Designated Naturalization
Examiner

[Aug. 7, 1980]
(Date)

[Appendices Omitted]

IN THE DISTRICT COURT OF THE UNITED STATES
IN AND FOR THE NORTHERN
DISTRICT OF CALIFORNIA
AT SAN FRANCISCO, CALIFORNIA

Petition No. 268438

PETITION FOR NATURALIZATION

OF

WINIFREDO PABLEO BELLO

**FINDINGS OF FACT,
CONCLUSIONS OF LAW AND RECOMMENDATIONS
OF DESIGNATED NATURALIZATION EXAMINER**

TO THE HONORABLE, THE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE NORTHERN DISTRICT OF CALIFORNIA:

1. PRELIMINARY STATEMENT: The undersigned, duly designated under the Immigration and Nationality Act to conduct preliminary examinations upon petitions for naturalization, respectfully submits that the above-named petitioner, a native and national of the Philippines, age 62 years, presently in the United States in the status of visitor, filed the petition for naturalization numbered above on April 24, 1980, under Section 701 of the Nationality Act of 1940, as amended (Act of March 27, 1942 (56 Stat. 182)).

The question presented is whether the petitioner is now eligible to be naturalized under the statute cited above

relating to service in the Armed Forces of the United States during World War II, and which statute expired by its own terms on December 31, 1946.

The petitioner served honorably in the Armed Forces of the United States from October 31, 1942 to June 30, 1946. His service was with the Philippine Commonwealth Army and he enlisted in the Philippines. Petitioner was never lawfully admitted to the United States for permanent residence. Verification of his service and its honorable character has been obtained from official records.

The petitioner herein has offered no evidence to establish that he attempted to apply for or even inquired about naturalization while he was on active duty, and prior to the expiration of the law on December 31, 1946.

• • • • •

[Legal Discussion Omitted]

FINDINGS OF FACT

(a) The petitioner filed a petition for naturalization on April 24, 1980 under the provisions of Section 701 of the Nationality Act of 1940, as amended;

(b) The petitioner is a Filipino national who served honorably on active duty with Armed Forces of the United States from October 31, 1942 to June 30, 1946 by reason of his service in the Philippine Commonwealth Army during that period; he was enlisted in the Philippines;

(c) The petitioner is not a lawful permanent resident of the United States;

(d) The petitioner has offered no evidence to show that he made an effort to become naturalized while on active duty or applied for naturalization prior to December 31, 1946.

• • • • •

8. RECOMMENDATION OF THE DESIGNATED EXAMINER: I recommend that this petition for naturalization be DENIED pursuant to the facts and law outlined above.

Respectfully submitted,

/s/ ALLEN B.P. LEE
General Attorney (Nationality)
Designated Naturalization
Examiner

[Aug. 7, 1980]
(Date)

[Appendices Omitted]

IN THE DISTRICT COURT OF THE UNITED STATES
IN AND FOR THE NORTHERN
DISTRICT OF CALIFORNIA
AT SAN FRANCISCO, CALIFORNIA

Petition No. 268448

PETITION FOR NATURALIZATION

OF

BONIFACIO LEONCIO ZARCAL

**FINDINGS OF FACT,
CONCLUSIONS OF LAW AND RECOMMENDATIONS
OF DESIGNATED NATURALIZATION EXAMINER**

TO THE HONORABLE, THE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE NORTHERN DISTRICT OF CALIFORNIA:

1. PRELIMINARY STATEMENT: The undersigned, duly designated under the Immigration and Nationality Act to conduct preliminary examinations upon petitions for naturalization, respectfully submits that the above-named petitioner, a native and national of the Philippines, age 60 years, presently in the United States in the status of visitor, filed the petition for naturalization numbered above on April 24, 1980, under Section 701 of the Nationality Act of 1940, as amended (Act of March 27, 1942 (56 Stat. 182)).

The question presented is whether the petitioner is now eligible to be naturalized under the statute cited above

relating to service in the Armed Forces of the United States during World War II, and which statute expired by its own terms on December 31, 1946.

The petitioner served honorably in the Armed Forces of the United States from October 10, 1941 to June 17, 1946. His service was with the Philippine Commonwealth Army and he enlisted in the Philippines. Petitioner was never lawfully admitted to the United States for permanent residence. Verification of his service and its honorable character has been obtained from official records.

The petitioner herein has offered no evidence to establish that he attempted to apply for or even inquired about naturalization while he was on active duty, and prior to the expiration of the law on December 31, 1946.

* * * * *

[Legal Discussion Omitted]

FINDINGS OF FACT

(a) The petitioner filed a petition for naturalization on April 24, 1980 under the provisions of Section 701 of the Nationality Act of 1940, as amended;
(b) The petitioner is a Filipino national who served honorably on active duty with Armed Forces of the United States from October 10, 1941 to June 17, 1946 by reason of his service in the Philippine Commonwealth Army during that period; he was enlisted in the Philippines;
(c) The petitioner is not a lawful permanent resident of the United States;
(d) The petitioner has offered no evidence to show that he made an effort to become naturalized while on active duty or applied for naturalization prior to December 31, 1946.

* * * * *

8. RECOMMENDATION OF THE DESIGNATED EXAMINER: I recommend that this petition for naturalization be DENIED pursuant to the facts and law outlined above.

Respectfully submitted,

/s/ ALLEN B.P. LEE
General Attorney (Nationality)
Designated Naturalization
Examiner

[Aug. 7, 1980]
(Date)

[Appendices Omitted]

IN THE DISTRICT COURT OF THE UNITED STATES
IN AND FOR THE NORTHERN
DISTRICT OF CALIFORNIA
AT SAN FRANCISCO, CALIFORNIA

Petition No. 268479

PETITION FOR NATURALIZATION

OF

BENJAMIN NATIVIDAD BONUS

**FINDINGS OF FACT,
CONCLUSIONS OF LAW AND RECOMMENDATIONS
OF DESIGNATED NATURALIZATION EXAMINER**

TO THE HONORABLE, THE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE NORTHERN DISTRICT OF CALIFORNIA:

1. PRELIMINARY STATEMENT: The undersigned, duly designated under the Immigration and Nationality Act to conduct preliminary examinations upon petitions for naturalization, respectfully submits that the above-named petitioner, a native and national of the Philippines, age 65 years, presently in the United States in the status of visitor, filed the petition for naturalization numbered above on April 24, 1980, under Section 701 of the Nationality Act of 1940, as amended (Act of March 27, 1942 (56 Stat. 182)).

The question presented is whether the petitioner is now eligible to be naturalized under the statute cited above

relating to service in the Armed Forces of the United States during World War II, and which statute expired by its own terms on December 31, 1946.

The petitioner served honorably in the Armed Forces of the United States from October 1, 1941 to June 30, 1946. His service was with the Philippine Commonwealth Army and he enlisted in the Philippines. Petitioner was never lawfully admitted to the United States for permanent residence. Verification of his service and its honorable character has been obtained from official records.

The petitioner herein has offered no evidence to establish that he attempted to apply for or even inquired about naturalization while he was on active duty, and prior to the expiration of the law on December 31, 1946.

• • • • •

[Legal Discussion Omitted]

FINDINGS OF FACT

(a) The petitioner filed a petition for naturalization on April 24, 1980 under the provisions of Section 701 of the Nationality Act of 1940, as amended;

(b) The petitioner is a Filipino national who served honorably on active duty with Armed Forces of the United States from October 1, 1941 to June 30, [1946 by reason of his service in the Philippine]] Commonwealth Army during that period; he was enlisted in the Philippines;

(c) The petitioner is not a lawful permanent resident of the United States;

(d) The petitioner has offered no evidence to show that he made an effort to become naturalized while on active duty or applied for naturalization prior to December 31, 1946.

• • • • •

8. RECOMMENDATION OF THE DESIGNATED EXAMINER: I recommend that this petition for naturalization be DENIED pursuant to the facts and law outlined above.

Respectfully submitted,

/s/ ALLEN B.P. LEE
General Attorney (Nationality)
Designated Naturalization
Examiner

[Aug. 7, 1980]
(Date)

[Appendices Omitted]

APPENDIX I

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Petition No. 251849

PETITION FOR NATURALIZATION

OF

ANTOLIN PUNSALAN PANGILINAN

STIPULATION

For the purpose of the record in the above captioned petition for naturalization, Petitioner and the Immigration and Naturalization Service, through their respective undersigned counsel, hereby stipulate as follows:

1. The issues raised in this petition, both of fact and law, are identical to the issues of fact and law presented in the Category II petitions in the *Naturalization of 68 Filipinos War Veterans*. 406 F. Supp. 931 (N.D. Cal. 1975).

2. The Immigration and Naturalization Service filed a notice of appeal to the United States Court of Appeals from the said decision but subsequently moved to dismiss its appeal pursuant to the provisions of Rule 42(b) of the Federal Rules of Appellate Procedure. The said motion was granted by the Court of Appeals on November 30, 1977.

3. While he did not make a determination with respect to this individual petition the Associate Attorney General, Mr. Michael Egan, did direct the Commissioner of the Immigration and Naturalization Service to oppose, as a general matter, applications

from Filipino war veterans who took no steps to become naturalized under the Nationality Act of 1940 before that Act expired on December 31, 1946.

4. A second appeal of the granting of Category II petitions, *In Re Avena, et al.* (9th Cir.), was withdrawn on October 11, 1979, on the authorization of the Solicitor General. He had decided that these petitioners had submitted their applications before November 30, 1977, the date the original appeal was withdrawn in *68 Filipino War Veterans*, and they should obtain the benefit of our then existing policy which was evidenced by the withdrawal of the appeal. This petitioner submitted his application after November 30, 1977.

5. The documents listed as APPENDIX V are true copies of documents taken from the record of the Immigration and Naturalization Service, they are [omitted] and shall be considered a part of the record of the above captioned petition for naturalization.

Gerald McVey
Fallon, Hargreaves,
Bixby & McVey

Atty. for:
Antolin Punsalan
Pangilinan

U.S. IMMIGRATION AND
NATURALIZATION
SERVICE

By: /s/ ALLEN B.P. LEE
Allen B. P. Lee, General
Attorney (Nationality)

By: /s/ SUZANNE ENGELBERG

APPENDIX J

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

Petition No. 23358

PETITION FOR NATURALIZATION

OF

MARIO VALDERRAMA LITONJUA

**FINDINGS OF FACT,
CONCLUSIONS OF LAW AND RECOMMENDATION
OF DESIGNATED NATURALIZATION EXAMINER**

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA:

I

The undersigned, duly designated under the Immigration and Nationality Act to conduct preliminary examinations upon petitions for naturalization, respectfully submits that the above named petitioner, a native and national of the Philippines, born in Cavite City on June 26, 1923, presently in the United States in the status of a nonimmigrant visitor for pleasure, filed the petition for naturalization numbering above on October 4, 1978, under Section 701 of the Nationality Act of 1940, as amended, (Act of March 27, 1942 (56 Stat. 182)).

II

The questions presented in this matter are: Whether the petitioner is now eligible to be naturalized under the provisions of the Nationality Act of 1940 (Supra) due to service during the Second World War, which statute expired by its own terms on December 31, 1946, and under current Section 329 of the Immigration and Nationality Act (8 USC 1440); whether the petitioner now has standing to sue due to his failure to show that he was injured in fact by the absence of notice and due to the withdrawal of the Naturalization Examiner from the Philippines; even if he were injured in fact, whether he should not be afforded equitable relief because he waited over thirty years after the statutory deadline and is therefore guilty of laches; whether the withdrawal of the naturalization authority from the Philippines was the exercise of exclusive authority in the field of foreign policy, and therefore is not a justiciable issue before this court; and whether such conduct did not violate due process under the circumstances prevailing at the time.

III

At the preliminary examination, conducted on October 4, 1978 at San Diego, California, the petitioner was sworn in and testified that he had served honorably in the United States Navy, enlisting at the U.S. Naval Station at Cavite City in the Philippine Islands on May 9, 1941, until honorably discharged in the Philippines on April 10, 1946. Verification of his service and its honorable character has been obtained from official records.

According to his own testimony at his preliminary examination (see petitioner's affidavit (Exhibit #1)), the petitioner made no inquiry or application concerning his eligibility for naturalization as a United States citizen at anytime during his military service nor at anytime

thereafter while he still remained in the Philippine Islands. He was confined to a military hospital from the cessation of hostilities until the day of his discharge on April 10, 1946.

In June of 1946 the petitioner accepted employment as a civilian with the United States Army Transport Service. He was physically present in the Philippines until early July 1946 when he departed for the United States on his employer's vessel. The petitioner stated that he arrived in Seattle, Washington on July 29, 1946, and sometime shortly thereafter, he made inquiry with the Immigration Service office there regarding the requirements for naturalization, and then presumably submitted some sort of paperwork (see Exhibit #1) [omitted]. What the exact nature of these papers may have been is now shrouded in the mists of time. His Immigration Service Record reveals only an undated form letter by the Immigration Service to the U.S. Bureau of Naval Personnel requesting verification of the petitioner's military service and the Navy's affirmative response thereto, dated November 26, 1946 (See Exhibit #2) [omitted].

The petitioner testified that he was instructed by the Immigration Service not to leave the Seattle area without first contacting that office, and that further processing of his case first required verification of his military service (See Exhibit #1). On the afternoon of August 16, 1946, the petitioner was notified by his employer that he was to depart the United States for the Philippines on the next day, a Saturday. He left the United States on the appointed day as required by his employer without first notifying the Immigration Service as requested. Although his departure was not effected on a business day, the petitioner admitted that he never attempted to post a letter to the Seattle Immigration Office prior to his departure, nor did he at anytime thereafter attempt to contact INS until he returned to Seattle on January 2, 1947. At that time he renewed his inquiry in person and was informed by Seattle Immigration that the law enabling him to naturalize based upon his military service had expired, and that it was no longer possible for him to proceed with his naturalization (see Exhibit #1). There the matter has remained until the petitioner filed this petition for naturalization some thirty-one years later.

IV

A discussion of the history of dispute in the line of cases is appropriate. Section 701 of the Act of March 27, 1942 sought to reward through naturalization those who were then serving or who had served honorably on active duty with the Armed Forces of the United States. Section 702 of the Act (56 Stat. 183) provided for the overseas naturalization of those then serving. The provisions of both of these Acts expired on December 31, 1946. During the statutory period, designated government officials traveled to various parts of the world to examine applicants and actually confer naturalization administratively. This was one of the very few times during our Nation's history that such administrative procedures were available. The Philippines were among the overseas locations visited by those officers following the recovery of those islands by friendly forces. However, due to remonstrations by certain Philippine officials to the U.S. Government, the American Government Officer's naturalization authority was withdrawn for a period of approximately nine months, from October 1945 to August 1946. Such a situation did not occur elsewhere. Thus, for this nine-month period, naturalization was not available to qualified servicemen then in the Philippines.

Section 701 of the Act of March 27, 1942 called only for honorable service in the United States Armed Forces and did not require, as does its current successor statute, Section 329 of the Immigration and Nationality Act (8 USC 1440), that the serviceman be enlisted in a qualifying

geographic area or that he have been at any time lawfully admitted to the United States for permanent residence. Those geographically qualifying areas are: the United States, the Canal Zone, American Samoa and Swains Island. Most of the Filipino nationals had either enlisted in the Philippines in such units as the Philippine Scouts (part of the United States Armed Forces) or, being members of the Commonwealth Army of the Philippines, had been incorporated by executive and military orders into the United States Armed Forces. Others served in guerrilla units recognized by the United States Armed Forces. Our petitioner was in the regular United States Navy.

Within recent years, the situation of another Filipino native and veteran of World War II was considered by the United States Supreme Court (*INS v. Marciano Haw Hibi*, 414 U.S. 5 (1973)). In *Hibi*, the Supreme Court considered the petitioner's argument that the Government was estopped from using the cutoff date of December 31, 1946, as spelled out in Section 701 of the 1940 Act, since the Government, by withdrawing its examiner from the Philippines for a period of several months, had effectively denied Filipino veterans the opportunity to apply at that time. *Hibi* had not applied nor tried to apply prior to December 31, 1946. The Supreme Court was not persuaded by that argument.

In a split decision, the Court ruled that since Hibi had not applied for naturalization until many years after 1946, the withdrawal of the examiner did not rise to the level of "affirmative misconduct" required to successfully invoke estoppel against the Government. Even though the Court concluded that naturalization under Section 701 was no longer available to Hibi on the issue of estoppel, there was no hint of what the decision might have been had Hibi attempted to apply before that section's expiration.

Subsequently, a number of Filipino World War II veterans residing in San Francisco, California filed petitions for naturalization claiming eligibility under the same provision. Their petitions were joined and, notwithstanding the Supreme Court's decision in *Hibi*, the United States District Court found the majority of the 68 Filipinos eligible for naturalization under Section 701 of the Nationality Act, as amended. (See *Matter of Naturalization of 68 Filipino War Veterans*, 406 F. Supp. 931 (N.D. Cal. 1975)).

This Court will note that the San Francisco Court divided the 68 petitioners into three categories. In the first category were those veterans who proved to the Court that they applied or had made a reasonable effort to apply before December 31, 1946, but were denied the opportunity to file formal petitions because of the Government's withdrawal of its overseas officer. The Court, distinguishing *Hibi*, found that these persons had "constructively" filed petitions and that the Government was estopped, notwithstanding *Hibi*, from now denying them naturalization.

In the second category were those veterans who convinced the Court that they would have applied had the officer not been withdrawn. These persons, like *Hibi*, took no steps to apply until many years later. With respect to these, the Court found that the veterans had been denied due process, an issue not raised or decided in *Hibi*. It reasoned that, since before July 4, 1946, Filipinos were non-citizen nationals of the United States; they owed permanent allegiance to the United States. In turn, they were entitled to the protection of the United States Constitution, and thus, due process.

The final category included several Filipinos who could not produce the critical proof of qualifying honorable and active service in the United States Armed Forces during the World War II period. The Court gave this group additional time to produce that proof. Since evidence was not forthcoming, the petitions of those in the third category were dismissed.

Regarding categories one and two, the Government sought appeal. The appeal was grounded primarily on the fact that the petitioners' cases were not essentially distinguishable from that in *Hibi*. Briefing was completed and the appeal awaited oral argument in the Ninth Circuit Court of Appeals.

In a memorandum dated September 21, 1977, the Commissioner of the Immigration and Naturalization Service recommended to the Department of Justice that the appeal be withdrawn. Officials at the Department of Justice agreed and, in an order dated November 30, 1977, the Court of Appeals granted the Government's motion to dismiss. The order made no comment one way or the other on the merits of the case(s).

Upon re-examination, the Government has adopted the reasoning of the San Francisco Court only as to Filipino World War II veterans in the first category.

The petitioner in this case therefore arguably falls within category two in that he was eligible to naturalize and was in the Philippines during a portion of the disputed nine-month period. Between October 1945, when the authority of the examiner was removed and when Mr. Litonjua was discharged in April 1946, he was physically in the Philippines. He was not eligible to naturalize after he was discharged in April of 1946. The terms of Section 702 required that the veteran must still be on active duty before he could naturalize. Therefore, the Government's "exposure" under category two is limited to the period between October 1945 and April 1946, a period of six months. The petitioner was not harmed by the absence of an examiner to naturalize him for such a short period. He was harmed by his own conduct in that he failed to diligently pursue his application in the United States under Section 701.

It is, however, the Government's position that the naturalization of those veterans in the second category is

unsupported by statute and precedent. Notwithstanding the decision in the San Francisco case, and for the following reasons, the Government must recommend that this petition for naturalization be denied.

The current Immigration and Nationality Act of 1952 was amended by the Act of September 26, 1961, Sec. 17 (75 Stat. 656). Specifically, Section 310 of the 1952 Act was amended by the addition of subsection (e) thereof, (8 USC 1421(e)). The amendment provided that, notwithstanding the savings clause of the Act, all petitions for naturalization filed after the effective date of the amendment would be determined in accordance with the requirements of the 1952 Act still in effect. As indicated earlier, the basic and current Act requires, under Section 329 (8 USC 1440), that qualified servicemen or veterans must have enlisted (or reenlisted, by judicial interpretation) in certain geographical areas or have been admitted to the United States for lawful permanent residence.

The District Court, in the cases of the 68 veterans, did not discuss Section 310(e) in reaching its conclusion as to either categories one or two. If category one veterans are determined to have "constructively filed" their petitions in 1946, Section 310(e) does not apply, and the savings clause, Section 405(b) (8 USC 1101 note), would allow their petitions to be heard and determined in accordance with the requirements of law in effect when such petitions were filed.

The present petitioner, however, made no attempt to inquire or apply in the Philippines until well after the enactment of Section 310(e), and, as such, is bound by the requirements of the present statute (8 USC 1440). Since he was neither enlisted nor inducted in the qualifying geographical area outlined above and is not a lawful permanent resident of the United States, the requirement is not met.

In a decision dated October 17, 1975, just over three weeks prior to the District Court's judgment in the cases of the 68 Filipino veterans, the Ninth Circuit Court of Appeals ruled that Section 310(e) of the Act (Supra) barred the naturalization of a veteran whose eligibility was claimed on the basis of the provisions of a prior statute, *U.S. v. Pasion*, 524 F2nd 249 (9th Cir., 1975).

In *Pasion* the petitioner was a Filipino World War II veteran who failed to file a petition for naturalization prior to December 31, 1946. He petitioned for naturalization in 1974, claiming that a 1940 statute had given him permanent residence status, and that such status was preserved by the "saving clause" in the 1952 Act. The Ninth Circuit Court held that Section 1421(e) unambiguously cut off all rights under prior naturalization statutes, stating:

> "The statute is not ambiguous. It requires petitions for naturalization to be determined by reference to the standards currently in effect, without circumvention by application of the savings provisions of Section 405(a). An appellant has never been admitted for permanent residence, and as his arguable implied status survives only by operation of Section 405(a), we are clear that Section 1421(e) forecloses reliance on that the implied status to meet the requirements of 8 U.S.C. 1440. Moreover, even if Section 1421(e) were ambiguous, reference to the legislative history of the section makes clear that Congress intended to foreclose what the eclectic appellee here attempts, and to impose uniform burdens upon contemporaneous petitions for naturalization. The House Judiciary Committee's Report on the bill explains:
>
> Section 17 (i.e., 9 U.S.C. Section 1421(e)) amends Section 310 of the Immigration and Nationality Act (of 1952) so as to require all petitions for naturaliza-

> tion filed after the enactment of this section to be heard and determined in accordance with the requirements of this act.
>
> The purpose of this amendment is to overcome interpretations placed upon the savings clause (Sec. 405 of the Immigration and Nationality Act (*United States v. Menasche*, 348 U.S. 528, 75 S.Ct. 513, 99 L.Ed. 615 (1955); *United States v. Wolff*, 270 F. 2d 422, 3 Cir., cert. den. 362 U.S. 928 (1960); *Medalion v. United States*, 279 F. 2d 162, 2 Cir. (1960)), holding in effect, that residence in the United States before December 24, 1952 was sufficient to confer naturalization rights under the Nationality Act of 1940, as amended, notwithstanding its repeal on that date by the Immigration and Nationality Act. As a consequence petitioners of this claim are being considered eligible, 9 years after its repeal, for naturalization under the 1940 law, and, if more favorable to the circumstances in their cases, they may elect to claim the benefits of the Immigration and Nationality Act. This, notwithstanding the fact that the petition for naturalization was not filed until after December 24, 1952, when the Immigration and Nationality Act became effective.
>
> In the opinion of the committee, such interpretations are contrary to the intent of Congress clearly indicated in the basic Immigration and Nationality Act. The administration of two nationality laws simultaneously is cumbersome, inefficient, and unfair to other applicants for naturalization. In accordance with the original purpose of the Immigration and Nationality Act, this clarifying amendment will make it amply apparent that from and after its enactment the requirements and provisions of the Immigration and Nationality Act will be uniform and will apply to all

petitioners for naturalization. The Department of Justice endorses this amendment in its report of July 7, 1961, on a similar provision contained in H.R. 6300; *United States v. Pasion*, at 251-252."

The *Menasche, Wolff* and *Medalion* cases all involved hybrid claims of eligibility for naturalization under both the 1940 Nationality Act and the 1952 Immigration Act, whereby the claimants were selectively accorded the benefits of both acts without the burdens. For example, Menasche claimed that he was entitled to credit for his period of residency in the United States prior to the 1952 Act and that, because he became a resident before the 1952 Act added the "physical presence" requirement, he did not have to comply with it. Despite the fact that he had not filed his petition for naturalization within seven years of the date on which he filed his "Declaration of Intention", laches having barred his naturalization under the 1940 Act, he claimed that since the present act no longer required a "Declaration of Intention" he should be naturalized. The Supreme Court so held. In *Wolff*, the same claims were approved by the Third Circuit.

In *Medalion*, the Second Circuit admitted the petitioner to naturalization because of residence prior to the 1952 Act and waived the "physical presence" requirement despite the fact that he would have been barred from naturalization under the 1940 Act because he never filed the Declaration of Intention. It was the result that these petitioners were accorded the benefits of both Acts, without the burdens of either—all this because of the savings clause—which the legislature undertook to correct for the future saying:

> "The administration of two nationality laws simultaneously is cumbersome, inefficient, and unfair to other applicants for naturalization."

In the present case, Mr. Litonjua seeks naturalization under prior law, although he has not met the December 31, 1946 filing deadline under that law. He does not meet the present statute's requirement of lawful admission for permanent residence; whereas *Pasion* attempted to resurrect prior law through the savings clause, the present petitioner is using a due process claim. The result is the same—the administration of two nationality acts "simultaneously", which results Congress expressly intended to preclude in enacting Section 1421(e).

Furthermore, the situation of category two veterans is indeed indistinguishable from that in *Hibi* (Supra). Since no attempt was made to inquire or apply in the Philippines prior to December 31, 1946, the Government's failure to have an examiner in the Philippines did not amount to the "affirmative misconduct" necessary to invoke estoppel, nor was it a denial of due process.

In the petitioner's case it should again be noted that he was physically present in the Philippines up until July of 1946, after which he left for the United States. The examiner was unavailable from October of 1945 until August of 1946. The petitioner was outside of the Philippines as a result of his own [*sic*] during the entire period when the second examiner was available to naturalize him (between August of 1946 and December of 1946).

It was therefore not the alleged misconduct of the United States Government in removing the examiner between October of 1945 and August of 1946, which was "the cause" of the petitioner's failure to naturalize. It was his own act of departing the Philippines during the very period when he could have availed himself of the presence of the examiner, which partially led to his difficulty. The petitioner elected to go to the United States to present his claim. Once there, he did not remain in the United States to pursue his case, nor did he attempt to notify the Seattle Immigration Office of his departure as were his instruc-

tions given by that office. It is an open question whether or not he *could have* refused to leave on August 17, 1946, according to his employer's instructions. There is no evidence that the petitioner even tried to postpone his departure. He was, after all, no longer in the U.S. Navy; he was a civilian. Certainly he did nothing to inform the Seattle Immigration Office of his departure subsequent to August 17, 1946. This case is therefore distinguishable from all of the previous ones brought by other Filipino war veterans in that the petitioner was the primary cause of his own undoing.

It is the position of the Government that naturalization under Section 702 of the Nationality Act of 1940 is not available to a Filipino World War II veteran who cannot prove that he made a reasonable inquiry or application prior to the expiration of the above section on December 31, 1946.

The petitoner made no such inquiry while he remained in the Philippines and it was his own conduct which prevented the successful completion of his inquiry while he was in the United States. The removal of the Government's examiner in the Philippines had nothing to do with Mr. Litonjua's failure to actively pursue his inquiry in the United States.

V

This petitioner has failed to show that he was injured in fact by the absence of notice and the withdrawal of the Naturalization Examiner. Even if he were injured in fact, he should not be afforded equitable relief because he waited over thirty years after the statutory deadline. He is guilty of laches.

In *Hibi*, the Supreme Court clearly considered the delay in filing the petitions for naturalization as a prime reason

for denying equitable relief. It concluded the opinion by saying:

> "Respondent's effort to claim naturalization under a statute which by its terms had expired more than 20 years before he filed his lawsuit must fail. *Hibi*, at 9."

Although the Court did not use the word "laches", that principle was what the Court had in mind.

> Laches is a neglect or failure on the part of a party in the assertion of a right, continuing for an unreasonable and unexplained length of time under circumstances permitting diligence, resulting in disadvantage to the other party. *Rank v. Krug*, 142 F. Supp. 1, 123 (S.D. Cal. 1956); affirmed in part, reversed in part on other grounds, 293 F. 2d 340; affirmed in part 372 U.S. 62.
>
> A court of equity will not give relief against conscience or public convenience when a party has slept on his rights. *Wagner v. Baird*, 48 U.S. 234 (1949) [*sic*].

Laches is a defense to equity actions which operates independently of statutes of limitations. *Russell v. Todd*, 309 U.S. 280 (1939).

Hibi did not take all the affirmative steps available to him. The same is true of this petitioner. There is no evidence that petitioner attempted to be naturalized in the Philippines between August, 1945 and December 31, 1946. In fact, the evidence in this case shows that the petitioner was outside of the Philippines during this period.

Although immigration quotas for the Philippines have been heavily over-subscribed since World War II, the petitioner could have applied for an immigrant visa long ago. He has U.S. Citizen children. After waiting his turn for a visa, he would have been eligible for naturalization immediately under 8 U.S.C. 1440, which waives the five-year residency period ordinarily prerequisite for naturalization.

This long delay in the assertion of his alleged rights works a considerable disadvantage to the Government. It must meet claims based on legislation which expired thirty years ago and is forced to join issues of fact relating to occurrences of more than thirty years ago. As a practical fact, there is no realistic way of testing the claim of this petitioner as to what happened to him in 1945-46. It is for this precise reason that stale claims are not allowed, because the mere fact of staleness destroys the effectiveness of the adversary process to arrive at the truth. Memories fade and records disappear.

The delay of this claimant in asserting his alleged right to citizenship is unjustifiable. There were other avenues of relief open, but for unexplained reasons he did not trouble to explore or take advantage of his options. The delay has frustrated the Government and the Court in ascertaining the facts, and goes against the clear congressional policy of cutting off prior naturalization rights as of September 26, 1961. This delay not only diminishes the credibility of the claim, but under the Supreme Court's *Hibi* decision, constitutes a dispositive reason for its denial. This petitioner's effort to claim naturalization under a statute, which by its terms expired more than 30 years before, must fail.

VI

The withdrawal of the naturalization authority from the Philippines was the exercise of exclusive authority in the field of foreign policy, and is therefore not a justiciable issue. Such conduct did not violate due process under the circumstances prevailing at the time.

In order to naturalize Mr. Litonjua, this Court must rule that this petitioner, if he had sued in October of 1945, could have persuaded a court of the United States to order George H. Ennis, Vice Consul of the United States at Manila, to disregard the concerns of the Philippine Gov-

ernment. The Constitution commits such matters to the exclusive discretion of the Executive Branch. It was beyond the power of the judiciary to afford remedy on the basis of an act of foreign policy in 1945, and it is still beyond a court's power to do so.

There is no convincing argument against the fact that the withdrawal of the authority to naturalize Filipino World War II veterans was for the reason that the Philippine Government opposed the loss of its former fighting men during the postwar rehabilitation period. The Philippine Government's position was never formally expressed because at that time the Philippine Government supported proposals for the legislative grant of citizenship to *all* citizens of the Philippines. It could hardly oppose naturalization of a segment of the population consistently with its official advocacy of United States citizenship for all. Thus, through unofficial communications through the State Department, the Philippine Government let its true wishes be known, apparently more than once. Judge Renfrew, in the *68 Veterans* case, highlighted the principle that it is because such unofficial or confidential communications are essential in the conduct of foreign relations that foreign policy matters are not justiciable. However, he erred in his application of the criteria for determining justiciability enunciated in *Baker v. Carr,* 369 U.S. 186 (1962).

In *Baker v. Carr,* the Supreme Court, by Mr. Justice Brennan, set forth six criteria for determing [*sic*] whether a question is justiciable. After a lengthy analysis of cases involving non-justiciable questions, he wrote:

> "Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial

policy determination of a kind clearly for non-judicial discretion; or the impossibility of a Court's undertaking independent resolution without expressing a lack of the respect due coordinate branches of Government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments of one question." *Baker v. Carr,* supra, at 217.

Judge Renfrew considered each of these criteria and found that the *68 Vererans* case does not satisfy *any* of those criteria. The Government disagrees. This case clearly poses a purely political question by most, if not all, of the criteria, under the *Baker* decision; if a question satisfies *any one* of the six criteria, it must be dismissed as non-justiciable.

First, Judge Renfrew glossed over the fact that Article 2, Section 2, of the Constitution commits the conduct of foreign relations to the President. He stated on Page 23 of his opinion; "There can be no doubt that the Constitution commits the foreign policy power to the *Executive and Legislative Branches*. . . " Although we agree with Judge Renfrew that an issue is not beyond the Court's cognizance purely because it touches on foreign policy, this is a case where foreign policy was the central consideration in the act complained of. By the first of the *Baker* criteria, the "textual commitment" test, the issue whether the consul should or should not have naturalized Filipino veterans between October 1945 and August 1946 is not justiciable. The second test is whether there are "judicially discoverable and manageable standards" by which to decide the issue. Certainly a court is competent to rule on the issue of equal protection, but it cannot be called upon to ascertain or manage the standards against which to decide whether the request of a foreign government, relating to the conduct of consular affairs within its territory, should

be respected or ignored. By the second of the *Baker* criteria, the issue is non-justiciable.

The third test is whether the decision would involve an "initial policy determination of a kind clearly for non-judicial discretion". The policy decision involved was not whether or not to grant citizenship rights of Filipino war veterans; the policy decision was whether or not the United States could afford to ignore the concern expressed by the Philippine Government. That issue was one of first impression and was clearly of a kind for nonjudicial discretion.

Fourth, there can be no dispute that for a court to usurp that discretion would not only express a lack of the respect due the coordinate branches of the government, but would implicitly subjugate the executive prerogative in foreign affairs to the Judicial Branch.

Fifth, there is a need for adherence to the politicial decisions already made, although in this case the INS has no reservations about full inquiry into the reasons for adherence to the decision made in 1945. We should adhere to that decision because any other course of action opens the door for any veteran who did nothing to seek naturalization before December 31, 1946, but has since changed his mind to be naturalized now, more than thirty years after his rights lapsed. No one has argued that any veteran who merely changed his mind after he had missed the deadline should now be naturalized. Nevertheless, that is precisely the effect of the San Francisco District Court's holding. Without any showing that they were interested enough to file an application or write a letter in 1945-46, applicants could be admitted to United States Citizenship, and there would be no obstacle to countless thousands of veterans still in the Philippines. As the Government strenuously argues in San Francisco, the immigration policies of Congress and of the INS have been formulated on the basis that the World War II veterans' rights lapsed

over thirty years ago. Congress affirmatively and expressly cut off these rights in 1961. The burdens of accommodating the large number of eligible veterans was considered in 1946 to be overwhelming. Today, each eligible veteran, if granted citizenship, will be entitled to petition for nonquota immigrant visas for his immediate relatives (see 8 U.S.C. 1151(b)). The actual number of unexpected immigrants is unknown, but suffice it to say that, in view of the difficulty of absorbing the 130,000 Indochinese refugees from the Communist takeover of 1975, when the refugees were all eventually *sponsored* by individual United States families, and now with the influx of over 100,000 Cuban refugees, the influx of a large number of new unsponsored immigrants presents good reason for adherence to the past decision. The principle that existence of legal rights does not turn on the number of persons asserting the rights, articulated by Judge Renfrew, is not helpful in deciding whether there is any policy reason for adhering to past executive decisions. There are valid reasons here.

Sixth, the passage of time does not, as Judge Renfrew decided, erase the concern of other governments that they may not be able to rely on the actions of the State Department as the United States representative in foreign affairs. The prospect that a court can reverse foreign policy *thirty years after the fact* is no less unsettling than the proposition which necessarily flows from Judge Renfrew's decision; that in 1945 a court could have ordered the naturalization of foreign nationals at the United States Embassy in their country over the objections of their government.

The central issue of this case, the propriety of withdrawing the naturalization authority from the Philippines, is a political question which is not justiciable. By most, if not all, the tests set forth by the Supreme Court in *Baker v. Carr,* this issue is not a proper subject of judicial inquiry.

Consequently, it was in error for the San Francisco District Court to decide that this was a wrongful act and to hold that this act sparked rights which survived Congressional acts to extinguish any such rights, only to burst forth thirty years later.

Four Judges of the Ninth Circuit Court have concurred in the view that:

> The conduct at issue in *Hibi* was not the negligence or malfeasance of minor officials, but a deliberate decision of policy by the Attorney General. Although acting in the face of a contrary congressional purpose, the Executive Branch was attempting to advance diplomatic relations between the United States and the Philippines. Regardless of whether the Government's conduct constituted an abuse of discretion, its decisions were so patently of the type committed to the Executive Branch that the Court was extremely reluctant to nullify them over 20 years later in order to relieve one individual instance of hardship. Chote [*sic*: Choy] Circuit Judge, joined by Judges Browning, Ely, and Hufstedler, dissenting in *Santiago, et al. v. INS,* 528 F.2d 488, 496 (9th Cir. 1975).

VII

The loss of the opportunity for naturalization was not the result of intentional, unjustified, invidious discrimination by the United States Government, and thus does not constitute a denial of due process. Even if a withdrawal of the naturalization authority from a given country had been the unilateral act of the United States Government, it would not constitute a denial of equal protection unless it were an intentional, arbitrary, and invidious discrimination against natives of the Philippines, without any rational basis. In this case, the basis for the Executive action was that the Philippine Government opposed the nat-

uralization of Filipinos in the Philippines. There can be no serious argument that this does not constitute a rational basis for withdrawing the naturalization authority from the Philippines and not from other countries. The withdrawal of the naturalization authority from the Philippines was not done for the purpose of discriminating against Filipinos. Without purposeful discrimination, there is no denial of equal protection. The Supreme Court, in *INS. v. Hibi,* 414 U.S. (1973), held that neither the unavailability of a naturalization examiner, nor the failure to publicize the rights to naturalization under the Second War Powers Act constituted an equitable ground for granting a petition filed 20 years late. A *fortiori,* these omissions cannot constitute a legal basis for this relief.

Under Supreme Court decisions, the Equal Protection Clause does not command that all persons be treated with absolute equality. It requires only that when the law draws distinctions between classes of persons, the classifications bear some relation to a legitimate governmental purpose. *Morey v. Doud,* 354 U.S. 457 (1957).

> The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. *McGowan v. Maryland,* 366 U.S. 420, 425, 426 (1961).

The Equal Protection Clause prohibits only individual and arbitrary discrimination. *Goesaert v. Cleary,* 335 U.S. 464 (1948). The standard for Federal statutes is the same. See e.g. *United States Department of Agriculture v. Moreno,* 413 U.S. 528 (1973).

Thus, in *Filipino American Veterans and Dependants Association v. United States,* 391 F. Supp. 1314 (N.D. Cal. 1974), the Court upheld a Federal statute which accorded Filipinos half the monetary veterans' benefits available to other veterans. The basis for the distinction was that Congress deemed half-benefits sufficient because the cost of living is far less in the Philippines. The Equal Protection Clause does not equalize all circumstances; it merely prohibits disparate-treatment for persons in the same circumstances.

Mr. Justice Frankfurter summarized:

> "The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." *Tigner v. Texas,* 310 U.S. 141, 147 (1940).

The circumstances of this case were that the Philippine Government opposed naturalization of Filipino war veterans in the Philippines, while no other countries objected.

Federal statutes do npt deny equal protection of the laws because the circumstances of affected persons vary with the laws of the different states. Thus a person convicted under the Federal Firearms Act as a person "who has been convicted of a crime of violence" cannot complain that the crime of violence listed in the Act (murder, manslaughter, rape, mayhem, kidnapping, burglary, housebreaking, assult [*sic*] with intent to kill, commit rape or rob, assault with a dangerous weapon, or assault with intent to commit any offense punishable by imprisonment for more than one year) are differently defined in the various states and territories. *Cases v. United States,* 131 F.2d 916 (1st Cir. 1940). A Federal Estate Tax Statute, in allowing a deduction for state inheritance taxes, does not deny equal protection to citizens of Florida merely because that state does not tax inheritances. *Florida v. Mellon,* 273 U.S. 12 (1927): *Semble, B.F. Sturtevant v. Commissioner of Internal Revenue,* 75 F.2d 216 (1st Cir. 1035) [*sic*].

In this case, the circumstances of the Filipino war veterans did not permit equal treatment. Thus, if Congress had expressly excluded Filipinos from naturalization on the grounds of their government's opposition, the statutory distinction would have been unassailable. Likewise, this same distinction drawn, as the circumstances required by the Executive Branch, is no less valid, rational and reasonable. As a practical matter of foreign policy, Filipinos could not be naturalized in the Philippines; as the Supreme Court stated in *Dominion Hotel v. Arizona,* 249 U.S. 265, 268 (1919):

> "The Fourteenth Amendment is not a pedagogical requirement for the impracticable."

The Equal Protection Clause does not prohibit the unavoidable, rational and reasonable basis for the distinction drawn in this case. The Government has no argument with the principle that:

> "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as to make unjust and illegal discrimination between persons under similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution"; *Yick Wo v. Hopkins,* 118 U.S. 356, 373, 374 (1886).

However, in the case of allegedly discriminatory *Executive* action, a requirement of purposeful and intentional discrimination is added to the requirement that the classification be without a rational basis.

The "rational basis" test applies to distinctions drawn by the Executive, just as it does to those drawn by the Legislature.

> (T)he conscious exercise of some selectivity in enforcement is not in itself a Federal constitutional violation; *Oyler v. Boyles,* 368 U.S. 456 (1962).

Relying on the *Oyler* case, the Ninth Circuit Court found no violation of equal protection as incorporated in the Fifth Amendment's due process clause on a criminal defendant's allegations of selective prosecution. In *United States v. Sacco,* 428 F.2d 264 (9th Cir. 1970), the Court, finding that the decision to investigate and prosecute the defendant under the alien registration law was based on his suspected role in organized crime, held that this was a rational basis for the Executive decision.

The landmark *Yick Wo* case involved a San Francisco ordinance prohibiting the operation of a laundry in wooden buildings without the "consent of the Board of Supervisors". The Board had denied applications from Yick Wo and some 200 of 230 Chinese who had been operating their laundries in their wooden buildings for upwards of 20 years, while it had approved the applications of 80 Caucasians and denied only one. The Court held the Board's action to have denied equal protection of the laws to Yick Wo, who had been jailed for operating a laundry in a wooden building without the Board's consent.

The Court's holding is squarely upon discriminatory administrative action, and does not reach the question whether the ordinance was unconstitutional.

> In the present cases, we are not obliged to reason from the probable to the actual; and pass upon the validity of the ordinances complained of as tried merely by the opportunities which their terms afford of unequal and unjust discrimination in their administration; for the cases present the ordinances in actual operation and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant the conclusion that, whatever may have been the intent of the ordinance as adopted, they are applied by the public authorities charged with their administration and thus representing the state itself, with a mind so unequal

> and oppressive as to amount to a practical denial by the state of . . . equal protection of the laws. *Yick Wo v. Hopkins,* at 373.

The language of the *Yick Wo* decision strongly suggests that if the alleged discrimination is in the administration of a facially non-discriminatory statute, it must be shown to be purposeful or intentional. The opinion speaks in terms of an evil eye and an unequal hand. Nothing in Mr. Litonjua's case suggests that.

In *Snowden v. Hughes,* 321 U.S. 1, 8 (1944), the Court states unequivocally:

> "The unequal [*sic*: unlawful] administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination."

The Ninth Circuit and the other courts of appeals have repeatedly held that there must be a purpose to discriminate. *Williams v. Field,* 416 F.2d 283, 286 (9th Cir. 1969); *Hoffman v. Holden,* 268 F.2d 280, 290 (9th Cir. 1959); *United States v. Falk,* 479 F.2d 616, 619 (7th Cir. 1973) en banc; *Friedlander v. Cimino,* 520 F.2d 318, 320 (2nd Cir. 1975); *Hawkins v. Town of Shaw, Mississippi,* 461 F.2d 1171, 1173 (5th Cir. 1972); *Tollett v. Laman,* 497 F.2d 1233, 1233 (8th Cir. 1974); *Robinson v. McCorkle,* 462 F.2d 111 (3rd Cir. 1972).

In this case, it is clear that the withdrawal of the naturalization authority was not done *for the purpose* of discriminating against Filipino war veterans. The facts strongly indicate the contrary.

At Page 18 of the deposition of former INS Commissioner Ugo Carusi, taken by Donald L. Ungar on February 24, 1974 in connection with the *68 Veterans* case, Mr. Ungar [*sic*: the examiner] asked:

> Q. Now, in withdrawing the designation of the examiner in the Philippines, was there ever any factor that entered into your consideration such as prejudice against the Philippine race or any type of conspiracy that you know of to keep these people from coming to the United States as Americans?

Mr. Carusi answered:

> A. No. If there had been, I wouldn't have countenanced it.

If the INS had harbored a purpose to deprive Filipino veterans of their naturalization, it is impossible to explain why the United States Consul in Manila was originally given the naturalization authority in August 1945. If the withdrawal of the naturalization authority in October 1945 was done with the purpose to discriminate against Filipinos, the restoration of the authority in August 1946 was a self-defeating act.

It cannot be argued that the effect on Filipinos was purposeful. Certainly there is no evidence to support such a finding, which is essential to a conclusion that the Executive Authority has violated the equal protection guarantee. Judge Renfrew glossed over this defect in the *68 Veterans* case by dealing with the case in terms of its involving an "inherently suspect" classification based on national origin. There are two errors in Judge Renfrew's application of this approach.

First, he disregarded the fact that designating the classification as "suspect" is merely the means to an end, deciding whether the classification is reasonably related to a legitimate government purpose. The Supreme Court's repeated admonitions that certain classifications will be subject to severe scrutiny mean that it will make an independent judgment on the "rational basis" question. For example, in *King v. Saddleback Junior College District,* 445 F.2d 932 (9th Cir. 1971), the Ninth Circuit Court

upheld school board regulations on the length of male students' hair. The board had the statutory power to promulgate regulations to maintain order in the schools. The board's premise was that long hair was disruptive of order, and the Court held that, given that premise, the hair-length regulation was a rational means of attaining order, a legitimate governmental purpose. The point of the case is that where the classification is not "suspect," the courts will not examine the soundness of the premise. If, however, the regulation had involved a "suspect" classification, the Court would have more closely examined the validity of the premise and the legitimacy of the governmental purpose. This is precisely what the Supreme Court did in *Hirabayashi v. U.S.*, 320 U.S. 81 (1943); *Korematsu v. U.S.*, 323 U.S. 214 (1944); *Ovama v. California*, 332 U.S. 633 (1948); *Takahashi v. Fish Commission*, 334 U.S. 410 (1948); *Graham v. Richardson*, 403 U.S. 365 (1971); *Sugarman v. Dougall*, 413 U.S. 634 (1973); and *In re Griffiths*, 413 U.S. 717 (1973). However, the facts of the instant case obviate the need for the "suspect classification" analysis because the distinction is clearly rational on its face. The INS did not maintain a naturalization authority in the only county [*sic*] which objected to it.

The second reason the "suspect classification" analysis is not appropriate in this case is, as we have stated, there was *no purpose* on the part of the INS to draw distinctions disfavoring veterans of Philippine nationality. The only purpose is this case was the purpose of the Philippine Government to retain the finest of its male population. In the traditional "suspect classification" analysis, the first step is to ascertain the Government's purpose; the second is to determine whether this purpose is legitimate; the third is to determine what reason the Government gives for drawing the distinctions between classes of individuals; and the final step is to determine whether the classification

bears a rational relation to the purpose. As applied to this case, this analysis breaks down at every step.

First[,] there was no purpose to exclude Filipinos from the benefits of the Act; thus there can be no issue of the legitimacy of such purpose. The INS did not single out Filipinos for disparate treatment; their government did. Since the INS did not draw the distinction, there can be no meaningful analysis whether it was a rational distinction for the INS to draw. Every case cited by Judge Renfrew involves a situation where the Legislature or Executive *actively undertook to establish* the suspect classification. It is only in that context that the ordinary equal protection analysis is applicable. In this case, the analysis must stop when it is determined that the Government had no purpose to discriminate against Filipinos. This conclusion brings us full circle to the inevitable correctness of the rule of *Snowden v. Hughes*, Supra, that where the alleged discrimination is in the execution rather than in the enactment of a statute, there must be proof that the alleged discrimination is intentional and purposeful. In this case there is no evidence of purposeful arbitrary discrimination; thus the petitioner has not been deprived of due process by any discriminatory act of the United States Government. For this reason, there is no basis for granting the belated naturalization petition of a man who did nothing to seek naturalization in the Philippines before December 31, 1946, and who failed to proceed on an application submitted in the United States due to his own neglect.

Pursuant to the provisions of Section 335 of the Immigration and Nationality Act (8 USC 1446), I hereby make the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT:

(A) The petitioner filed a petition for naturalization on October 4, 1978 under the provisions of Section 701 of the Nationality Act of 1940, as amended;

(B) The petitioner is a Filipino national who served honorably on active duty with the United States Navy, enlisting in the Philippines from May 9, 1941 until he was honorably discharged on April 10, 1946 in the Philippines;

(C) The petitioner is not a lawful permanent resident of the United States;

(D) The petitioner has offered no efidence [*sic*] to show that he made any inquiry in the Philippines about naturalization or applied therefor while there prior to December 31, 1946;

(E) That the petitioner did inquire concerning his naturalization in Seattle, Washington sometime in late July or in early August of 1946 and that his inquiry was being processed by the Seattle office of the Immigration and Naturalization Service;

(F) That the petitioner left the United States on his own without attempting to notify the Immigration Office of his departure;

(G) That the petitioner returned to the United States at Seattle, Washington on or about January 2, 1947 without having prosecuted his case beyond his first inquiry in late July or early August 1946;

(H) And that the law enabling the petitioner to naturalize due to his military service expired on December 31, 1946.

CONCLUSIONS OF LAW:

The petitioner is ineligible for naturalization under the provisions of Section 701 of the Nationality Act of 1940, as amended, because of the decision of the United States Supreme Court in *INS v. Hibi,* 414 U.S. 5 (1973), and because of current Section 310(e) of the Immigration and Nationality Act, as amended, (8 USC 1421(e)), notwithstanding the decision of the United States District Court, San Francisco, California in *Matter of Naturalization of 68 Filipino War Veterans,* 406 F.Supp 931 (N.D. Cal. 1975).

RECOMMENDATION:

I hereby recommend that the Petition for Naturalization of MARIO VALDERRAMA LITONJUA be DENIED pursuant to the facts and law outlined above.

Respectfully submitted,

/s/ JOSEPH M. RAGUSA
General Attorney, (Nationality)
Designated Naturalization
Examiner

7/21/80
Date

ADDENDUM

Petition #23358

The Government respectfully calls to the Court's attention the following three recent decisions on point with this brief. These decisions, as yet unreported, were handed down subsequent to the preparation of the Government's brief here and are supportive of the Government's position.

The first and most recent was decided by The United States District Court for the Northern District of California by the Honorable William W. Schwarzer on August 15, 1980. (*In Re: Petition of Naturalization of Renato Leopold Barretto;* Number 248806.)

The second, (*In Re: Naturalization Petition of Marcelo Enrile Inton;* SA 79 CA 284), was decided on July 2, 1980 by the United States District Court for the Western District of Texas, at San Antonio.

The last is a decision by the United States Court of Appeals for the Second Circuit, (decided on July 16, 1980.) *In Re: Petition for Naturalization of Antonio Olegario;* (No. 717—September Term 1979.)

Copies of the above-mentioned decisions are [omitted].

Respectfully submitted,

/s/ JOSEPH M. RAGUSA

November 5, 1980 — Joseph M. Ragusa, General Attorney Nationality

APPENDIX K

STATUTES INVOLVED

1. Sections 701, 702, and 705 of the Nationality Act of 1940, as amended by the Second War Powers Act, ch. 199, Section 1001, 56 Stat. 182-183, 8 U.S.C. (Supp. V 1945) 1001, 1002 and 1005, provided in pertinent part:[1]

> Section 701. * * * [A]ny person not a citizen regardless of age, who has served or hereafter serves honorably in the military or naval forces of the United States during the present war and Who shall have been at the time of his enlistment or induction a resident thereof and who (a) was lawfully admitted into the United States, including its Territories and possessions, or (b) having entered the United States, including its Territories and possessions, prior to September 1, 1943, being unable to establish lawful admission into the United States serves honorably in such forces beyond the continental limits of the United States or has so served may be naturalized upon compliance with all the requirements of the naturalization laws except that (1) no declaration of intention, no certificate of arrival for those described in group (b) hereof, and no period of residence within the United States or any State shall be required; (2) the petition for naturalization may be filed in any court having naturalization jurisdiction regardless of the residence of the petitioner; (3) the petitioner shall not be required to speak the English language, sign his petition in his own handwriting, or meet any educational test; * * * *Provided, however,* That * * * (3) the petition shall be filed not later than December 31, 1946. * * *

[1] The Nationality Act of 1940 was repealed by Section 403(a)(42) of the Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 280.

Section 702. During the present war, any person entitled to naturalization under Section 701 of this Act, who while serving honorably in the military * * * forces of the United States is not within the jurisdiction of any court authorized to naturalize aliens, may be naturalized in accordance with all the applicable provisions of section 701 without appearing before a naturalization court. The petition for naturalization of any petitioner under this section shall be made and sworn to before, and filed with, a representative of the Immigration and Naturalization Service designated by the Commissioner or a Deputy Comissioner, which designated representative is hereby authorized to receive such petition in behalf of the Service, to conduct hearings thereon, to take testimony concerning any matter touching or in any way affecting the admissibility of any such petitioner for naturalization, to call witnesses, to administer oaths, including the oath of the petitioner and his witnesses to the petition for naturalization and the oath of renunciation and allegiance prescribed by section 335 of this Act, and to grant naturalization, and to issue certificates of citizenship; * * *.

Section 705. The Commissioner, with the approval of the Attorney General, shall prescribe and furnish such forms and shall make such rules and regulations, as may be necessary to carry into effect the provisions of this Act.

2. Section 310(e) of the Immigration and Nationality Act of 1952, as added, Act of Sept. 26, 1961, Pub. L. No. 87-301, 75 Stat. 656, 8 U.S.C. 1421(e), provides:

Notwithstanding the provisions of section 405(a)[2] any petition for naturalization filed on or after Sep-

[2] Section 405(a) of the Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 280, was a general savings clause that

tember 21, 1961, shall be heard and determined in accordance with the requirements of this subchapter.

preserved the legal effectiveness of certain acts taken under provisions of prior law that were in other respects superseded by the 1952 Act.

U.S. GOVERNMENT PRINTING OFFICE: 1987—181-483/40279

OPPOSITION

BRIEF

Supreme Court, U.S.
FILED
AUG 7 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

No. 86-1992

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

ANTOLIN PUNSALAN PANGILINAN, ET AL.
RESPONDENTS

BRIEF OF MARIO VALDERRAMA LITONJUA IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ROBERT A. MAUTINO
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QUESTION PRESENTED

Whether the Court should grant the petition in this individual case in view of the differences between this respondent and the other 14 respondents in this case.

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PRELIMINARY STATEMENT

Litonjua case differs from Pangilinan case. While at first blush, respondent Litonjua's case may appear to be identical to those of the associated Pangilinan respondents, in actual fact, Litonjua's case is radically different, as will be pointed out below. Litonjua's case is similar only in that he served honorably in the United States Navy in the Philippines from May 9, 1941 to April 10, 1946 and, during that time, he took no steps to apply for naturalization under the special war-time legislation. Thus, in that sense only, he can be considered a "Category II" veteran, but he is also much more. 1/

1/ The Government, the Courts and the various respondents in this litigation have used a shorthand method of describing Filipino veterans of World War II. This method uses the term "Category I" veteran and "Category II" veteran. Deriving from the system set up in In re Naturalization of 68 Filipino War Veterans, 406 F. Supp. 931 (N.D. Cal., 1975), "Category I" refers to eligible veterans who tried to apply for naturalization before the expiration of the special war-time legislation on December 31, 1946. "Category II" refers to otherwise eligible veterans who took no steps to try to apply for naturalization during that period.

REASONS FOR DENYING THE PETITION

SUMMARY OF ARGUMENT

Although Litonjua shares certain aspects in common with the Pangilinan respondents, his case is basically different from the cases of those veterans. First, the Government submitted no evidence whatsoever at trial to support its contentions in his case. Thus, while there was no argument on the fact that Government withdrawal of the naturalization examiner was peculiar to the Philippines, the Government produced no evidence to justify its discriminatory treatment of Filipinos. While the Pangilinan respondents stipulated on the evidence, Litonjua was not a party to their agreement. The Government's attempts to use evidence from cases to which Litonjua was not a party should not be allowed.

Second, Litonjua actually applied for naturalization and should, therefore, be

considered a Category I veteran. The Government's misinformation to him on January 2, 1947 that the special naturalization law had expired represented misconduct because Litonjua was eligible for naturalization under Section 324 of the Nationality Act of 1940, 54 Stat. 1149.

Third, the Government's argument as to "thousands" of potential immigrants resulting from a decision in favor of Litonjua is fallacious. The potential number, based on the Government's own assertions, is actually very small.

Fourth, Litonjua is now a citizen of the United States. He was naturalized on May 16, 1983 pursuant to the mandate of the Court of Appeals. It would be inequitable to disturb that status now, especially since the Government can get its ruling on applicable legal principles from the Pangilinan litigation.

Fifth, as to those aspects of Category

II which Litonjua has in common with the Pangilinan respondents, he has conferred, through counsel, with counsel in their case, and he joins the arguments set out in their brief to be filed with this Court.

ARGUMENT

I. Government Submitted No Evidence In Litonjua Case.

A. Failure of proof. In terms of simple arithmetic, the amount of evidence which the Government submitted to support its position in Litonjua's case was: ZERO.

At the trial on the matter in the United States District Court for the Southern District of California on December 15, 1980, Hon. Gordon Thompson, Jr., Judge Presiding, Litonjua submitted oral and documentary evidence to establish his case, and Judge Thompson admitted the appropriate items into evidence. While the parties agreed on the fact that the Government had withdrawn the naturalization examiner

from the Philippines in 1945 and that such withdrawal was peculiar to the Philippines, they did not agree on the Government's reasons therefore. The Government's total lack of evidence on the subject was raised at the trial by counsel for Litonjua, and from that day to this day, Litonjua and his counsel have lost no opportunity to point out that the Government has never produced any evidence to justify its position in Litonjua's case. Not one of the items produced by the Government in its Lodging to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit (hereafter, Lodging) at pages 473-547 was submitted to the District Court in Litonjua's case.

Since Filipinos were by statute nationals of the United States owing full allegiance to this nation until Philippine independence on July 4, 1946, 48 Stat. 456, Sec. 2(a)(1), they were protected by certain

fundamental rights, including the Fifth Amendment. Balzac v. Porto Rico, 258 U.S. 298, 312-13 (1922). Moreover, it is clear that the Fifth Amendment encompasses the right to equal protection of the laws. Bolling v. Sharpe, 347 U.S. 497 (1954).

Discrimination based upon national origin violates this constitutional right to equal protection unless it is shown to be necessary to the vindication of a compelling governmental interest. Graham v. Richardson, 403 U.S. 365, 371-72 (1971). The parties conceded that the withdrawal of an official empowered to administer naturalization pursuant to the war-time statute was peculiar to the Philippines, but the Government presented no evidence purporting to justify such discrimination. It follows therefrom that the Government failed to meet its burden of showing that the differential treatment was necessary

to the achievement of a compelling governmental interest.

Thus, Litonjua was denied the equal protection of the laws guaranteed by the due process clause of the Fifth Amendment, and the proper remedy is the allowance of naturalization pursuant to the Nationality Act of 1940, as amended by the Second War Powers Act, P.L. 77-507, 56 Stat. 182, March 28, 1942; INS v. Pangilinan, 796 F. 2d 1091 (9th Cir. 1986). Likewise, the Government produced no evidence to justify its position on the issue of statutory construction, and the same result should obtain. Id.

B. Litonjua not party to Pangilinan stipulation. The Pangilinan respondents stipulated with the Government that their cases were identical, in factual and legal issues, with the Category II petitioners in 68 Veterans, supra. Barretto v. U.S.,

694 F. 2d 603, 605 (9th Cir., 1982), reversed sub nom INS v. Litonjua, 465 U.S. 1001 (1984); Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit (hereafter, Petition) at 8. Litonjua was never a party to that stipulation and has never accepted it. In point of fact, Litonjua, in the many submissions in his case to the District Court, the Circuit Court and this Court, has always held himself apart from that stipulation and has never agreed that the Government's representations in his case have ever been proven.

C. Government attempts implied collateral estoppel on the evidence. In United States v. Mendoza, 464 U.S. 154 (1984), this Court held that the Government could not be collaterally estopped in a civil case from relitigating, against a different party, an issue which it may have

lost in a previous case. The Court recognized that the Government's position as a civil litigant was unique and that there were often good reasons for encouraging litigation on issues which may have been adversely decided against the Government in cases involving other parties. Id. at 163.

In Litonjua's case, the Government seems to be proceeding under the assumption that it can rely on evidence submitted in other cases to which Litonjua was not a party, and, in some way, bind him to that evidence, which he has never had an opportunity to inspect or contest. The only general knowledge about what kind of evidence the Government may have in its possession is found in reported cases which have mentioned specific pieces of evidence. However, some items are mentioned in some reported decisions but not in others.

Compare, for example, 68 Veterans, 406 F. Supp. 931, 936, 944 (4 items) with Olegario v. U.S., 629 F. 2d 204, 209, 210 (2nd Cir. 1980)(6 items), U.S. v. Mendoza, 672 F. 2d 1320, 1323 (9th Cir. 1982)(1 item) and INS v. Hibi, 475 F. 2d 7, 10 (9th Cir. 1973)(1 item).

Now the Government has lodged with this Court what purports to be twenty-three pieces of evidence, some of which have never been mentioned before in any reported case. Lodging at pages 473-547. Interestingly, the Government now withholds at least two pieces of evidence which were reported in 68 Veterans: (1) Memorandum from Paul McNutt, U.S. High Commissioner to the Philippine Islands, to Edward J. Shaughnessy, Special Assistant to the Commissioner of INS, November 6, 1945 (406 F. Supp. 931, 935-6, n. 4) and (2) Memorandum from Edward J. Shaughnessy to Ugo Carusi, November 9, 1945 (Id. at 943-4,

n. 22). It is likely that other evidence also exists which has not been presented. Where, for example, is any communication to High Commissioner McNutt asking for his views on the matter? How do we know whether the Government has only selected those items which support its case and ignored any relevant items of evidence which tend to support the veterans' cases?

Litonjua's point here is that, with all of this evidence supposedly in the Government's possession, why did the Government submit a total of zero pieces of evidence in his case and then try to bind him to the evidentiary findings of other courts in other cases to which he was not a party? The Government did not even request that any of the several judges who have heard this case take judicial notice, although such a request would most

likely have been rejected.

The central issue in Litonjua's case, as well as in the cases of most of the veterans, is the Government's alleged justification for its admitted actions to deprive eligible Filipinos of their legal rights to apply or not to apply for naturalization during the 1945-46 period. The more critical an issue to a particular litigant's position, the more reluctant courts have been to determine the issue by taking judicial notice. TWA, Inc. v. Hughes, 308 F. Supp. 679 (S.D.N.Y. 1969), modified on other grounds, 449 F. 2nd 51, reversed on other grounds 409 U.S. 363, rehearing denied 410 U.S. 975. In any case, there was no judicial notice taken of the Government's alleged evidence in Litonjua's case.

Litonjua should be entitled to naturalization because the Government

failed to prove its case when it had ample opportunity to do so. In this respect, his case differs from that of the Pangilinan respondents, and the Government's Petition in his case should be denied.

II. Litonjua is Category I Veteran and/or He Constructively Filed His Naturalization Petition in 1946.

Litonjua has argued all along that he is a Category I veteran in that he did make an application for naturalization in Seattle in 1946. Lodging at 462-3. Alternatively, he has also argued that he should be considered to have constructively filed his petition because he took all of the steps which he could possibly take to file his petition, and the failure to complete the process was not due to any failing on his part. The Court of Appeals did not reach either argument. Pangilinan v. INS, 796 F. 2nd 1091, 1095, n. 3.

Litonjua actually filed an application for naturalization, and, on that basis, the Immigration and Naturalization Service (INS) sent an inquiry to the Bureau of Naval Personnel (Appendix I, attached hereto). The Navy responded at the end of November 1946 (Appendix 2, attached hereto). These items were admitted into evidence by Judge Thompson along with Litonjua's testimony on the subject. Litonjua was ordered by his employer, the U.S. Military Transport Service, to depart the United States in mid-August of 1946. When he returned to the United States and inquired of INS, on January 2, 1947, about the status of his case he "was told by an officer there that the law which pertain (sic) to my case expired." Lodging at 463.

In point of fact, Litonjua was eligible for naturalization under Section 324 of the Nationality Act of 1940, 54 Stat. 1149,

which had not expired. (A copy of this section is reproduced in Lodging at 467). Thus, it was the Government's misinformation which caused Litonjua to miss his opportunity for citizenship.

In this respect also, Litonjua's case is different from that of the Pangilinan respondents, and the Government's petition should be denied also on this basis.

III. Government's "Numbers" Argument Falls Of Its Own Weight

The real reason the Government is contesting this case may be its fear of opening the flood gates to "thousands" of Filipino veterans who are similarily situated. Petition at 15. This argument falls of its own weight. At no time during the course of this litigation did the Government submit one piece of evidence to show how many veterans might be affected. In another case, the Court of Appeals noted the Government's lack of evidence on this

point. Mendoza, supra, 672 F. 2nd 1320, 1326-7. If the threat of overwhelming numbers of potential citizens was so great, why did not the Government submit any evidence on this point in the litigation below? In any case, even the Government's assertions produce only about two thousand eligible veterans. Petition at 15. These numbers pale into absolute insignificance when compared with the general news reports of several million persons eligible for permanent residence under the recently enacted Immigration Reform and Control Act of 1986, P.L. 99-603, November 6, 1986.

The Government tries to increase the importance of a favorable decision in this case by saying that each naturalized veteran could bring into the country untold numbers of family members under the provisions of the Immigration and Nationality Act, 8 U.S.C. 1101 et seq. In point of fact, the Government's premise is fallacious.

Litonjua was born on June 26, 1923. Appendix to Petition at 130a. Thus, he was seventeen years of age in May of 1941 when he joined the United States Navy at Cavite Naval Base in the Philippine Islands. He is surely one of the youngest of the eligible Filipino veterans of World War II, and he is now sixty-three years of age. The only family members which he and other veterans could bring into the United States immediately and without the quota restrictions of the immigration laws would be spouses and unmarried minor children. 8 U.S.C. 1151(b). Adult single children and married children of any age would be subject to quota restrictions. 8 U.S.C. 1153(a)(1) and (4). The Visa Office bulletin published by the Bureau of Consular Affairs, United States Department of State, shows that, for the month of August, 1987, the Philippine quota for unmarried adult children is backlogged

to February 15, 1981 and the quota for married children to January 15, 1980. Even if each eligible veteran were married, how many veterans in their sixties or older could have unmarried minor children? Thus, the immediate impact of a decision in favor of the veterans would be virtually negligible.

IV. Litonjua is a citizen of the United States

Mario Litonjua is a citizen of the United States now, having been naturalized on May 16, 1983 pursuant to the mandate of the Court of Appeals for the Ninth Circuit. Thus, in addition to the other items which separate his case from that of the Pangilinan respondents, Litonjua's case differs from those of the Pangilinan respondents also in this respect. The Government's position is not harmed if its petition is denied insofar as it relates

to Mr. Litonjua. The denial of its petition in Mr. Litonjua's case would not prejudice the Government which can still get its desired review of the issues posited in its petition in the cases of the fourteen veterans that remain in the Pangilinan litigation.

V. Litonjua as Category II Veteran

As noted in the preliminary statement, supra, Litonjua's case also has some Category II aspects. In this respect, many of the arguments to be put forward by the Pangilinan respondents also apply to him. Litonjua, through counsel, has conferred with counsel in that case and joins their argument in this regard.

CONCLUSION

Mr. Litonjua, a United States Navy veteran with five years of honorable war-time service and a former prisoner of war of the Japanese, finally obtained United States citizenship some 37 years after

filing his original application for naturalization in Seattle, Washington. That prized status should not now be disturbed in view of Mr. Litonjua's contribution to and sacrifices for the United States in World War II. He should not have to undergo the heavy additional expense of defending his case in this Court and, if reversed and remanded, of again prosecuting his case in the Court of Appeals upon those additional issues left open by that court in its opinion below.

The additional burden upon Mr. Litonjua becomes more apparent when contrasted with the almost negligible effect upon the Government which will, in any event, have its review of the Pangilinan issues in the cases of the other fourteen veterans in the instant petition. Mr. Litonjua's hard-won citizenship works no offense to the Government in its pursuit

of legal principles, and it would be inequitable to disturb it now in view of his war-time sacrifices for that same Government.

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

Robert A. Mautino
Attorney for Respondent
Mario Valderrama Litonjua

APPENDIX I

Immigration and Naturalization Service
United States Department of Justice
Seattle 4, Washington

12-40
12/10/45

File No.
1200-K-984-M

Bureau of Navy Personnel
Navy Department
Washington 25, D.C.

Dear Sir:

Re: MARIO LITONJUA

Subject has applied for naturalization under the provisions of Section 701 of the Nationality Act of 1940 which relate to persons who are serving or who have served honorably in the armed forces during the present war. It is necessary that he submit an authenticated copy of his service record. Please forward such a record in accordance with the enclosed request executed by subject.

If the record discloses that the subject has served outside the

continental limits of the United States since September 1, 1939, it is requested that this service be noted in your reply.

Respectfully,

R.P. Bonham
District Director
Seattle District

By /s/Edmund C. Morso
Edmund C. Morso
Chief, Nationality and
Status Section

Encl. 443255

APPENDIX 2

Pers-824C-EAH
498 52 22

26 November 1946

Immigration and Naturalization Service
U.S. Department of Justice
815 Airport Way
Seattle 4, Washington

Gentlemen:

Reference is made to the enclosed Form N-423, file number 1200-K-984-M from Mario Litonjua, Ex-Seaman first class, U.S. Navy.

The following duly authenticated statement of service is furnished for his use in filing a petition for naturalization under the provisions of Section 324 or 701 of the Nationality Act of 1940, as amended.

9 May 41 Enlisted in the U.S. Navy as Seaman second class at Roceiving(sic) Station, Cavite, P.I., for three years. Placed on active duty.

10 Apr 46 Issued Honorable Discharge as Seaman first class from Fleet Hospital #114, Navy #3149.

Date and place of birth: 26 June 1922, San Roque, Cavite, P.I.

Litonjua served outside the continental limits of the United States as a member of the U.S. Navy.

By direction of Chief of Naval Personnel:

Sincerely yours,

B.O. JONES
Lieut., USN
Records Activity

Encl.

APPENDIX 3

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARIO VALDERRAMA LITONJUA,	)	CA #81-5427
	)	DC #23358
Petitioner-Appellant,	)	
	)	
-vs-	)	STIPULATION TO
	)	CORRECT RECORD
IMMIGRATION AND	)	ON APPEAL
NATURALIZATION SERVICE,	)	(Rule 10e)
	)	
Respondent-Appellee.	)	
_____	)	

Due to a mechanical malfunction in the transcribing machine of Court Reporter Barbara Lynch, the closing argument of Appellant's counsel is not correctly reflected in the transcript of proceedings filed on or about September 10, 1981.

Accordingly, the parties hereto agree that the following may be substituted in place of the material beginning on page

16, line 12, and extending through page 17, line 7, inclusive.

* * * * * * * * *

[Material Omitted]

...The Government tries to hang its hat on the foreign policy ground but it has introduced no evidence to support that claim. Whatever evidence the Government may have, it has not been presented here, and we do not agree that their contentions in this regard have been proven. The Government's brief is not evidence, and no other evidence has been presented in this proceeding.

* * * * * * * * *

[Material Omitted]

Dated: September 28, 1981

/s/Robert A. Mautino
Robert A. Mautino
Attorney for Appellant

So stipulated:

/s/Joseph M. Ragusa
Attorney for Appellee

I agree that a mechanical malfunction caused an incorrect report of the material described.

/s/Barbara Lynch
BARBARA LYNCH
Court Reporter

OPPOSITION

BRIEF

Supreme Court, U.S.
FILED
AUG 21 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1992

In The

Supreme Court of the United States

October Term, 1986

IMMIGRATION & NATURALIZATION SERVICE,

Petitioner,

v.

ANTOLIN PUNSALAN PANGILINAN, *et al.*,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DONALD L. UNGAR
LAWRENCE N. DI CONSTANZO
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San Francisco, CA 94111
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Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

QUESTION PRESENTED

The question presented, as described by petitioner, is not a fair statement. The question is not whether Filipino veterans of World War II, whose opportunity to apply for American citizenship under greatly liberalized conditions expired in December, 1946, are nonetheless currently entitled to citizenship because no designated examiner was stationed in the Philippines to naturalize them under that law between October 1945 and August, 1946. Instead, the question is whether they remain eligible under that law because the Attorney General of the United States deliberately and intentionally revoked the authority of the naturalization representative to naturalize anyone in the Philippines during that period for the avowed purpose of preventing qualified Filipino veterans, like respondents, from applying for naturalization.

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STATEMENT

This case is about an aging and dwindling group of Filipino veterans of World War II, men who are now in their sixties and seventies, who served honorably in the armed forces of the United States in the Philippines during the war and who were promised the opportunity to become American citizens in return for their military service.

The promise was made to them by Congress in March, 1942, when it enacted a law authorizing the expeditious naturalization of certain non-citizens who would serve on active duty in American forces during the war. Ironically, the law was passed at the very moment that Filipino soldiers like these respondents were being honored as heroes by the American people for their valiant defense of Bataan and Corregidor in the dark, early days of the war.

This case is also about how the Attorney General of the United States broke that promise just as the war had ended, when, in the privacy of his office and with the stroke of a pen, he approved a plan that would make it impossible for respondents and other veterans in the Philippines to accept the offer of citizenship that Congress had made them.

The story of how all this happened begins with the enactment on March 28, 1942 of the Second War Powers Act, 56 Stat. 182. As a part of that Act, Congress added several provisions to the Nationality Act of 1940 which were designated as §§ 701 through 705 of the 1940 Act.

Section 701 exempted qualified servicemen and women from the usual naturalization requirements, including a period of residence in the United States. Section 702 provided for their naturalization overseas, beyond the juris-

diction of naturalization courts where immigrants ordinarily apply for citizenship. And § 705 directed the Commissioner to "carry into effect" the provisions of the law.[1]

For Filipinos, such as these respondents, who had never lived in the United States, § 702's provision for overseas naturalization was of critical importance. Other non-citizen servicemen, who had enlisted or were inducted while living in the United States, could expect to return after the war and qualify for naturalization either under § 701 or under the standard provisions. But there was no practical way for Filipinos who had joined the American forces in the Philippines to reach America unless they were first naturalized overseas because there was no place for any but a few under then existing immigration quotas.

To make sure that qualified servicemen serving overseas would have a chance to apply, § 702 called for designation by the Commissioner of Immigration of representatives to travel to the various theaters of war and to naturalize those servicemen wishing to apply. Acting in accordance with the foregoing directives, the Commissioner of Immigration promptly appointed representatives who went overseas to naturalize applicants on active duty there. Thousands of qualified servicemen were naturalized in all parts of the world and soon after the Philippines liberation, a representative was designated by the Commissioner to naturalize qualified servicemen in the Philippines as well. The representative, an American

---

[1] Sections 703 and 704 were housekeeping provisions and are not relevant to the issues raised here.

vice-consul in Manila, started to naturalize qualified servicemen in August, 1945. But no sooner had he begun when his authority was revoked by the Commissioner, with the express consent of the Attorney General of the United States.

The record in the proceedings below establishes that the Commissioner's action was prompted by a concern that too many Filipinos might take advantage of the naturalization law to leave the Philippines for the United States. Word had been relayed to the Commissioner from American diplomats in Manila reflecting the concern of certain anonymous Philippine officials that large numbers of Filipinos who were then eligible for naturalization might, if they became American citizens, leave the islands on the eve of Philippine independence. The events leading to that decision were summarized in a memorandum prepared by the Commissioner for the Attorney General, dated September 13, 1945, which concluded with the following suggestion:

> "The Philippine Government again has expressed to the Department of State its concern because Filipino members of the Armed Forces of the United States are being naturalized even though they have always been domiciled in the Philippine Islands. Since the islands are not embraced within the domain of any naturalization court, naturalization therein may be awarded only by an administrative official designated by me under the authorization of § 702 of the Nationality Act, 8 U.S.C. 1002. Mr. George Ennis, Vice Consul of the United States in Manila, has been designated to grant naturalization under § 702, but I do not believe he has yet exercised his authority.
>
> "In view of the concern expressed by the Philippine Government, it is my belief that the situation might

best be handled by revoking the authority previously granted to Mr. Ennis and by omitting to designate any representative authorized to confer citizenship in the Philippine Islands. This would eliminate a source of possible embarassment in our dealings with the Philippine people, who probably will be awarded independence in the near future."

The Commissioner's suggestion was approved by the Attorney General on September 26, 1945. And while American army and naval officers requested the designation of another representative for the Philippines thereafter, none was sent until August of 1946, almost a full year later. But that was after Philippine independence on July 4, 1946 and by that time, these respondents and most other veterans had been discharged from the service, and thus were no longer eligible to apply for naturalization under § 702.

They were no longer eligible because the benefits of § 702 were available to servicemen only while they were on active duty. Once discharged, their eligibility was lost. Therefore, when a new naturalization examiner returned to the Philippines late in 1946, his presence was of no consequence to these respondents who, by that time, had already left the armed forces. Only those who had been fortunate enough to re-enlist in certain army units which continued to be a part of the U.S. Army after Philippine independence were naturalized in October and November of 1946.

Obviously, as the Commissioner of Immigration himself wrote, no one could be naturalized in the Philippines if he, the Commissioner, refrained from sending a naturalization examiner there. By doing precisely that while these

veterans were being discharged from the service, the Commissioner was able to keep qualified Filipino war veterans, including respondents, from exercising their right to apply for American citizenship in exchange for the heroic service they gave to the United States during the war.

Now, some four decades later, the court of appeals has held that the action of the Attorney General exceeded his authority and thwarted the will of Congress. It has awarded respondents the American citizenship they should have had and enjoyed all those years.

REASONS FOR DENYING THE PETITION

There is no good reason for this Court to disturb the ruling of the court below.

This case involves a discrete group of war veterans whose number is getting smaller through the passage of time. Allowing the court of appeals decision to stand will not affect a large number of persons, particularly when compared to the millions of illegal aliens who have been invited to apply for legal resident status under legislation sponsored by this very same administration.

In addition, this case presents no issue of significant or lasting public interest. To be sure, the tension between the Executive and Legislative Branches which is involved here is an interesting issue. But it is an academic one because the historical facts which gave rise to the issue here are so peculiar as never to happen again. Consequently, the court of appeals' opinion will be precedent for nothing more than the cases of other Filipino veterans like respondents.

The decision of the court of appeals is not in conflict with other cases decided by this court; in particular, it is not in conflict with *INS v. Hibi*, 414 U.S. 5 (1973), because the constitutional and statutory issues present here were neither raised nor decided by this court in *Hibi*.

Finally, the court of appeals decided correctly that the Attorney General acted in excess of his authority when he halted further naturalizations in the Philippines in 1945. The court also had the authority to provide the only adequate remedy, the prompt naturalization of each respondent.

The Decision Below Will Not Affect a Large Number of Persons and Will Have No Significant or Lasting Public Interest

The Immigration and Naturalization Service (INS) would like this Court to believe that the Ninth Circuit's decision will open the doors of this country to untold thousands of new immigrants. To bolster this statement, the INS provides the alleged numbers of naturalization petitions that the veterans have filed. Petition for Certiorari at 15 n.22. Only two comments about these figures are appropriate. First, they are not a matter of record in any of these various cases that concern the naturalization of war veterans. Where the INS obtained the figures is unknown. Whether the figures are correct is also unknown. What the specific issues are in each case is unknown. The Court should therefore ignore the figures. Second, even if the Court takes the figures at face value, they are hardly astounding. The naturalization of a few thousand veterans and the eventual immigration of some of their dependents will have only a small impact on immigration from the Philippines, a country that consistently uses all of the 20,000 visas that are its annual allotment under our immigration quota system. Section 202(a) of the Immigration and Nationality Act, 8 U.S.C. § 1152(a). *See, e.g.*, U.S. Department of State, Bureau of Consular Affairs, Visa Office Immigrant Numbers for August 1987, indicating serious over-subscription in the Philippine quota.

Far more telling than the numbers that the petitioner trots out is the fact that the veterans are an aging and necessarily diminishing group. This statement includes, of course, both the veterans who have applied for naturalization and the veterans who have not and are outside the United States. Although we have not done a study, common sense tells us that the veterans who were active combatants or prisoners of war between 1942 and 1945 are at least in their sixties and older. This is a group that becomes smaller and smaller because of ill-health, disability, and death. Common sense also says that it is a settled group with many members who are unwilling now to relocate in this country.

There is also no great "spillover effect" from the naturalization of veterans. Petition for Certiorari at 15. Those who do naturalize and relocate in the United States will undoubtedly sponsor the immigration of their wives as "immediate relatives" outside the quota system. Section 201(b) of the Immigration and Nationality Act, 8 U.S.C. § 1151(b). But it is unlikely, because of their ages, that they now have many minor children who could also immigrate outside the quota system. *Ibid.* If they have unmarried adult children, they can sponsor the children's

immigration under the first preference quota category. Section 203(a)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1153(a)(1). But the waiting period for a first preference immigrant visa from the Philippines is at least six years. *See,* U.S. Department of State, Bureau of Consular Affairs, Visa Office Immigrant Numbers for August 1987. Married adult children could immigrate under the "fourth preference." *Ibid.;* § 203(a)(4). But their waitnig period would be about eight years. In other words, the persons who represent the spillover of the naturalization of the veterans will have to wait in line and slowly fit into the mainstream of all other immigrants. In terms of the quota system, this would be a very orderly process.

We note that any increased immigration attributable to the veterans is insignificant in comparison with the legalization program for millions of aliens who have been living here illegally, as provided in § 201 of the Immigration Reform and Control Act of 1986, § 245A of the Immigration and Nationality Act, 8 U.S.C. § 1255A. In sum, the United States cannot expect a disruptive burden on the immigration system or the naturalization system simply because the veterans become citizens. As to the INS purported concern about weighing claims based on old facts, one can only say that making judgments is something naturalization courts do every day. Last, a veteran who chooses to take his opportunity to apply for naturalization in the Ninth Circuit, rather than in the less favorable Second Circuit, is not forum shopping. Petition for Certiorari at 14. Section 701 of the 1940 Act provides that a veteran may file his application in any forum he wishes.

The administration's foreign policy with respect to the nascent Republic of the Philippines was completely fulfilled in 1945-46. It is doubtful that the present government of the Philippines either knows or cares about the veterans' legal battles or their outcome. The INS has never claimed the contrary. Consequently, there is certainly no present governmental need to perpetuate that policy.

Nor does this case present any issues of significant or lasting public interest. The conclusion of the court of appeals that the Attorney General's action was incompatible with the will of Congress, as expressed in the language of the statute, necessarily depends on the particular facts of this case. As noted, those facts are unique and, realistically, will never happen again. In short, the outcome of this case can have no bearing on the outcome of other cases involving the constitutional separation of powers doctrine.

Respondents' Naturalization Is Not Barred By the Hibi Case or § 310(e) of the Immigration and Nationality Act

Neither *I.N.S. v. Hibi,* 414 U.S. 5 (1973), nor § 310(e) of the Immigration and Nationality Act, 8 U.S.C. § 1421(e), bar the respondents' claims. In addition to the decision below, this has been the ruling of the two courts that have dealt with the issues at length. *Olegario v. United States,* 629 F. 2d 204 (2d Cir. 1980), *cert. denied,* 450 U.S. 980 (1981); *Matter of theNaturalization of 68 Filipino War Veterans,* 406 F. Supp. 931 (N.D. Cal. 1975), *appeal withdrawn,* No. 76-1832, 9th Cir. (Nov. 11, 1977). The Court's holding in *Hibi* is specific: an estoppel against the government to assert the deadline of the 1940

Act does not rise from the failure to publicize fully the veterans' rights under the Act of 1940 or to station a naturalization examiner in the Philippines at appropriate times. 414 U.S. at 8-9. The holding was exactly coextensive with the question that the government presented in in *Hibi*. *INS v. Hibi*, No. 72-1652, Petition for Certiorari at 2.

In comparison, the present case raised and still raises the issues of whether the Attorney General constitutionally injured the veterans' rights by disregarding a congressional mandate issued in the exercise of Congress' exclusive naturalization power and by denying the veterans the equal protection of the laws guaranteed to them in the due process clause of the fifth amendment. These issues arise out of what is now correctly recognized as the Attorney General's deliberate frustration of the veterans' rights through the withdrawal of the naturalization examiner in the Philippines, not through a mere failure to station him there. This Court has already characterized the Attorney General's behavior as a clear error in the administration of the 1940 Act. *INS v. Miranda*, 459 U.S. 14, 18 (1982).[2] Moreover, the record, which the court below thoroughly examined, reinforces the statement in *Miranda*.

Realizing what had happened in 1945-46, the court below granted a remedy to vindicate the veterans' rights. In the last analysis, this remedy disturbs the INS because

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2 The INS attempts to debunk this statement in *Miranda* as an off-hand, careless remark. However, the statement, brief as it is, serves a function in *Miranda:* it contrasts the unambiguous disregard of a statute in *Hibi* with the failure of such a showing in *Miranda*. To serve this obvious function, the statement must mean what it says.

it looks like equitable estoppel and not because this case is on all fours with *Hibi*. However, the fact that the remedy has a "close resemblance to an estoppel" is irrelevant because the veterans' claim do not now rest on an estoppel theory. *Lyng v. Payne*, — U.S. —, 106 S. Ct. 2333, 2340 (1986).[3]

Section 310(e) of the Immigration and Nationality Act, 8 U.S.C. § 1421(e), which prohibits the naturalization of anyone who cannot qualify for naturalization under current law, does not deprive the courts of authority to order the naturalization of the respondents under the old wartime law, given the Attorney General's error in withdrawing the naturalization examiner from the Philippines in 1945. Of course, such a suggestion would have no weight in the constitutional context, for § 310(e) could not be used to frustrate the remedy for a violation of due process. As *Olegario* noted, "the statutory amendment [i.e., § 310(e)] cannot negate the due process

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3 Imposition of *Hibi* on this case will also result in the disparate treatment of two groups of veterans that are otherwise identical. Despite the outcome of *Hibi*, the government agreed to the naturalization of large numbers of war veterans in withdrawing its appeal in *Matter of the Naturalization of 68 Filipino War Veterans*. These included not only the veterans involved in that case, but others who had filed preliminary naturalization applications by November 30, 1977 when withdrawal of the INS appeal was accepted by the Ninth Circuit. The veterans, naturalized under *68 Veterans*, are, in material respects, identical to the respondents now before the Court. Thus, the denial of the respondents' naturalizations now on the grounds that their claims are controlled by *Hibi* would perpetuate an anomalous and unjust discrimination between two groups of veterans that do not differ from each other in any significant way. This Court in *Hibi*, sitting in equity, did not contemplate such a situation. Thus it certainly did not mandate such a result.

rights of a petitioner who alleges that he was unconstitutionally denied the opportunity to apply for a benefit decreed by Congress." 629 F. 2d at 220.

Moreover, there is no indication whatever that § 310(e) was enacted by Congress with the knowledge that veterans like these respondents had been deprived of their right to apply for naturalization by administrative conduct which contravened the mandate of Congress. In other words, § 310(e) was not intended to add injury upon injury to these veterans or to perpetuate the injustice created by the Attorney General's unilateral action in 1945.

The legislative history of § 310(e) shows only that the section was enacted to prevent certain lawful permanent residents of the United States from choosing to apply for naturalization under either the 1940 Nationality Act or the 1952 Act, whichever was more favorable to them. The possibility of such a choice had been provided by the savings clause of the 1952 Act and judicial interpretations of it. Congress felt that the election was unfair to persons who could only be naturalized under the more stringent provisions of the present 1952 Act. It also felt that it was cumbersome to administer two naturalization laws at the same time. *See* 1961 *U.S. Code Cong. & Admin. News* at 2981-82. *See also, e.g., United States v. Menasche,* 348 U.S. 528 (1955). The result of § 310(e) was to require lawful permanent residents who could previously choose between the 1940 and 1952 Acts to apply only under the 1952 Act.

The respondents here are not within the scope of this legislative history. They are not lawful permanent resi-

dents of the United States. Thus, if they lose their suit now, they will not be able to apply for naturalization under the 1952 Act, as were the persons who could no longer choose naturalization under the 1940 Act after the passage of § 310(e). Naturalization proceedings for the respondents now will not entail the continuing administration of an expired law because the numbers of veterans are necessarily limited by time if nothing else. The naturalization of the respondents will be unfair to no other person imaginable. Indeed, a failure to naturalize qualified veterans would be an ultimate unfairness to them for the simple reason that their service for the United States in World War II will be rewarded by their deportations.

The Decision Below is Correct. The Remedy Provided Is Proper and Appropriate

The court of appeals decided correctly that the wartime naturalization law delegated to the Attorney General no authority to do anything but naturalize qualified veterans wishing to apply and, therefore, that the Attorney General thwarted the will of Congress when he deliberately withheld the services of a naturalization representative from the Philippines in 1945 for the avowed purpose of preventing qualified Filipino veterans from being naturalized. The court was correct also when it ordered respondents naturalized, even at this late date, as the only appropriate remedy for the wrong that was done to them.

As for the delegation of authority issue, there can be no doubt about the message Congress sent to the Commissioner of Immigration and Attorney General when, in 1942, it provided for the naturalization of qualified servicemen and women who would be serving overseas during the

war, for § 705 directed them explicitly to "carry into effect" all the provisions of the law. There is simply no way to stretch the language of the law to fit the proposition, offered by the INS below, that § 705 impliedly clothed the Attorney General with the discretion to pick and choose among applicants, even for foreign policy reasons. As the court of appeals noted,

> ". . . the language of the statute is clear. It contains no express or implied delegation of authority to the Attorney General to deny the benefits of the Act to eligible aliens for any reason. Congress used language that was mandatory, not discretionary. It spoke, for example, of representatives 'designated' to process naturalization petitions overseas, not representatives who 'may be designated' § 702. It mandated that the Commissioner, with the approval of the Attorney General, 'shall (not may) prescribe and furnish such forms and shall make such rules and regulations as may be necessary to carry into effect the provisions of this Act.' § 705." (Appendix to Petition for Writ of Certiorari at 16a.)

Retreating from its earlier position, the INS now argues that the Attorney General needed no delegation of authority whatever from Congress to disregard the mandate of § 705 in light of the concerns assertedly expressed by Philippine officials. Instead, the INS now says, he could do what he did because the Executive Branch does not need congressional approval for the exercise of its foreign affairs powers. For unless "specifically negated," says the INS, "it is *always* the implied will of Congress to give the Executive Branch authority to implement legislation overseas in a manner which will not undermine this country's foreign policy interests." Petition at 17.

That argument, however, is founded upon a circumstance which is not present in this case. For as the INS itself points out, congressional deference to the President's foreign affairs powers has been implied only when the President or his subordinate act in a way that *implements* legislation, not when they frustrate legislation.

For example, in all of the cases cited by the INS to support its views, Congress had either specifically delegated authority to the Executive Branch or there was a history of congressional acquiescence in a particular administrative practice, from which a delegation could be implied in light of the President's foreign affairs powers.[4]

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[4] Thus in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), there was no doubt that Congress had delegated the President the power to trigger by proclamation, the sanctions provided by Congress prohibiting the sale of arms to participants in a South American war. The only issue was whether the delegation was lawful. In *Regan v. Wald*, 468 U.S. 222 (1984), this court found statutory support for a Treasury Department regulation barring certain currency transactions with Cuba. *Dames & Moore v. Regan*, 453 U.S. 654 (1981) upheld an administrative order suspending the claims of American citizens then pending in federal courts against the government of Iran. Although Congress had not explicitly authorized such an order, this court held that Congress had done so impliedly because of its acquiescence in a long standing practice of the Executive Branch to settle claims of American citizens against foreign governments. In *Haig v. Agee*, 453 U.S. 280 (1981), the issue was whether the Secretary of State exceeded his powers by revoking Agee's passport on the ground that Agee's conduct abroad was endangering national security and interfering with the nation's foreign policy. Although the Passport Act of 1926 did not expressly authorize the secretary's action, his action was affirmed because of a long history of congressional acquiescence in the State Department's revocation of passports on national security grounds.

(Continued on following page)

But this Court will search in vain for a case that says a delegation of congressional authority may be implied for acts which are incompatible with congressional intent. On the contrary, when the Executive Branch takes measures incompatible with the will of Congress, its power is at its "lowest ebb" and courts can sustain it only by "disabling Congress from acting on the subject." *Youngstown Sheet & Tube Company v. Sawyer*, 343 U.S. 579, 637-638 (Jackson, J., concurring).

(Continued from previous page)

Goldwater v. Carter, 444 U.S. 996 (1979) is not in point here, as this court found as premature an action brought by certain senators claiming that President's revocation of a U.S. treaty with Taiwan was illegal. Like *Curtiss-Wright, Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103 (1948) involved a very plain delegation of authority from Congress to the Executive Branch, in this case to the Civil Aeronautics Board and the President to establish airline routes between the United States and foreign countries. In *Narenji v. Civiletti*, 617 F. 2d 745 (D.C. Cir. 1979), cert. denied, 446 U.S. 957 (1980) a regulation that discriminated against Iranian students during the American hostage crisis was upheld on the ground that Congress had impliedly delegated the authority of the INS to make such a rule in light of the broad authority Congress had delegated to the Attorney General to control immigration. In *Japan Whaling Association v. American Cetacean Society*, 54 U.S.L.W. 4929 (1986) this court found that action taken by the Secretary of Commerce was consistent with a treaty for the protection of whales. And, finally, in *Zemel v. Rusk*, 381 U.S. 1 (1965) this court concluded that because Congress had known of a State Department practice to preclude the use of American passports for travel to certain foreign countries for foreign policy or national security reasons, that Congress had impliedly consented to that practice when it enacted passport legislation. In this case, however, there certainly was no expressed delegation of authority to the Attorney General to deprive qualified applicants of the laws benefits. Nor was there any history of congressional acquiescence in any such practice.

This is particularly true when, as here, Congress has exercised the plenary authority it derives from the Constitution in the area of naturalization. U.S. Constit., Act. I, § 8, cl. 4. As the INS itself suggests, given Congress' exclusive naturalization powers "a naturalization court has no authority to dispense with congressionally mandated requirements for citizenship." Petition at 14, 22-23 citing *Fedorenko v. United States*, 449 U.S. 490, 517-518 (1981). What the INS forgets, however, is that the designated representatives of the immigration commissioner were, in effect, acting as naturalization courts with respect to overseas naturalizations under § 702 of the 1940 Act. Consequently, if naturalization courts are not free to ignore statutory provisions with respect to naturalization, then surely the Commissioner of Immigration and Attorney General were bound by the same limitation when they deliberately ignored the 1940's mandate to naturalize qualified veterans overseas. Plainly, they had no lawful authority to do so.

Moreover, §§ 701-705 of the Nationality Act of 1940 created for the beneficiaries of that act a right to apply for naturalization, a right to have their applications considered, and a right to be naturalized if found qualified. Precious rights, such as those, cannot be curtailed in the absence of an explicit delegation of authority by Congress. *Kent v. Dulles*, 357 U.S. 116 (1965). That kind of explicit authority is missing here.

The INS goes on to advance two other reasons why the court of appeals was wrong. Surprisingly, the first of these is that Attorney General did not "directly deny" respondents the benefits of the 1940 Act after all and somehow, therefore, did not violate the expressed will of Congress. For example, says the INS, the Attorney Gen-

eral did not direct that naturalization petitions filed by qualified veterans not be processed. Petition at 18.

In fact, that is precisely what the INS did in 1945. For those few veterans who submitted or tried to submit applications in 1945, or wrote letters of inquiry to the INS at its headquarters in the United States, were told in reply that they were out of luck unless they could come to the U.S. because the INS had no plans to send another naturalization representative to the Philippines.[5]

If the Attorney General did not "directly deny" the benefits of the 1940 Act or respondents, the INS at least concedes that his action had the "practical effect" of doing so because it left the veterans without anyone to process their applications in the Philippines. But that could have violated the will of Congress, says the INS, only if the statute required the Attorney General to ensure that all eligible veterans had a continuous opportunity to apply for naturalization during the time they were eligible for that benefit. That could not be what Congress had in mind, INS continues, because the Act necessarily afforded the Commissioner a degree of discretion in moving naturalization representatives from place to place. Petition at 18-19.

Obviously, § 705 was broad enough to allow the INS some discretion with respect to the allocation of limited naturalization personnel. But respondents were not denied their right to apply for naturalization because of

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[5] *See In re Naturalization of 68 Filipino War Veterans,* 406 F. Supp. 931 (N.D. Cal. 1975) for a discussion of "category I" veterans, i.e., those who tried to apply for naturalization in 1945 in the Pilippines but were rebuffed by the INS.

scheduling problems or the exigencies of war. Rather, they lost out because of a deliberate, intentional, premeditated decision by the Attorney General and Commissioner of Immigration to deny respondents the benefits of the law by revoking the authority of the naturalization representative who was already on the scene in post war Manila. As noted before, Congress did not delegate that kind of discretion to them.

Finally, the INS suggests that maybe Congress did not mean to provide for the naturalization of veterans who had been members of the Philippines Commonwealth Army (as distinguished from the smaller Philippines Scouts) before they were inducted into U.S. forces in 1940. The argument is premised upon the post-war enactment of an appropriations bill declaring that service in the Commonwealth Army was not to be considered as service in American armed forces. Petition 20, n.27. First Supplemental Surplus Appropriation Rescission Act, 1946, 60 Stat. 14.

But ever since *Petition of Munoz,* 156 F. Supp. 184 (N.D. Cal. 1957) and, in particular, throughout the Filipino war veteran litigation, the INS has accepted the district court's conclusion that the 1946 provision was meant only to save the the U.S. government money for veterans benefits such as termination pay and the GI bill. Consequently, the effect of that Act is not a part of this case and controversy.

Moreover, there is ample historical evidence that Congress must have intended to include members of the Philippines Commonwealth army in the benefits created by the wartime law. And that it did not intend a curtailment of those rights for fear of offending the nascent Philippines Republic. As already noted, for example, Con-

gress enacted the amendments at the very moment that the battles of Bataan and Corregidor were raging, and the exploits of Filipino soldiers were making banner headlines all across America. Second, Congress had enacted the Philippines Independence Act in 1934, 48 Stat. 463, and so it obviously knew in 1942 that the Philippines would become independent after the war. It also knew of the provision in the Act which authorized the President to make the Philippines Commonwealth army a part of U.S. forces, and that President Roosevelt had invoked that authority in 1940 Also § 701 included a provision making the law specifically applicable to veterans who "having entered the United States, *including its Territories and possessions,* prior to September 1, 1943, being unable to establish lawful admission to the United States serves honorably in such (U.S.) forces beyond the continental limits of the United States. . ." (emphasis added). As the court of appeals noted, the Philippines was then the largest U.S. possession and provided a reservior of manpower far greater than any other possession. It seems impossible then to suppose that Congress did not have all qualified Filipino veterans in mind, including Commonwealth army soldiers, when it enacted the foregoing provision.

This is not a case where there is a wrong without a remedy. If the Attorney General deprived the veterans of their statutory right to apply for naturalization without due process of law, a court can fashion an appropriate remedy. *Swann v. Board of Education,* 402 U.S. 1 (1970). The only appropriate remedy is the naturalization of the veterans.

Olegario suggests a parallel, but non-constitutional, analysis which also leads to the remedy of naturali-

zation for qualified veterans. The analysis depends upon the proposition that, when an administrative agency contravenes a statutory mandate, thereby acting in excess of it powers, the federal courts have jurisdiction to provide the injured party with a remedy as a matter of equity. Support for this proposition is found in *Leedom v. Kyne,* 358 U.S. 184 (1958), cited in the *Olegario* footnote. 629 F.2d at 226, n.9.

Leedom dealt with an issue that is analagous to the issue in this case. Under the nation's labor laws, certain professional employees were given the "right" to veto their representation by a collective bargaining unit which, without their consent, included non-professional employees. When the National Labor Relations Board certified such a bargaining unit, despite the lack of consent by its professional members, the Court found that the Board's action was

> "an attempted exercise of power that had been specifically withheld. It deprived professional employees of a 'right' assured to them by Congress. Surely, in these circumstances, a Federal District Court has jurisdiction of an original suit to prevent deprivation of a right so given."

358 U.S. at 189.

The Court concluded that the district court had jurisdiction to fashion a remedy because it found that nothing in the National Labor Relations Act had precluded the district courts from exercising original jurisdiction.

From *Leedom,* it follows that when the Court of Appeals concluded that the Attorney General acted in excess of his powers in this case, it could also provide the injured veterans with the only remedy that makes sense—their

prompt naturalization. Moreover, as stated in the *Olegario* footnote, there is nothing in the 1940 Nationality Act, its legislative history, or related subsequent provisions which either expressly or implicitly precludes judicial review.

A balancing of the equities in this case points to the appropriateness of naturalization. On the one hand, there has been a serious injury to the veterans which only naturalization can redress. On the other hand, the government is not injured at all. The 1940 Act applies only to the respondents and veterans like them. The historical facts are unique. As discussed above, the numbers of veterans are not very great. The "spillover" effect of their naturalization would be gradual and orderly. The families of the veterans are only a few of the thousands that immigrate from the Philippines yearly. The naturalization system will not be burdened by a flood of cases. The INS and naturalization courts should have no more difficulty assessing the credibility of a veteran's claim than they have in judging any other issue of fact. Above all, it is about time the United States honored the promise of American citizenship it made to these veterans so long ago.

CONCLUSION

At least one INS official recognized the conduct of his superiors for what it was. He was Edward J. Shaughnessy, special assistant to the Immigration Commissioner, who wrote on October 19, 1945 that revocation of the naturalization representative's authority in Manila created "the rather anomalous situation that while we recognize in law the legal right of these persons to the benefits of

REPLY BRIEF

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In the Supreme Court of the United States

OCTOBER TERM, 1987

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

ANTOLIN PUNSALAN PANGILINAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR THE IMMIGRATION AND NATURALIZATION SERVICE

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The court of appeals held that respondents, 15 Philippine veterans of World War II, were entitled to citizenship under a statute [1] that expired more than 40 years ago. The court reasoned that the Attorney General violated the 1940 Act by revoking the vice

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[1] Sections 701, 702, and 705 of the Nationality Act of 1940, as amended by the Second War Powers Act, 1942, ch. 199, § 1001, 56 Stat. 182-183, 8 U.S.C. (Supp. V 1945) 1001, 1002, 1005 [hereinafter the 1940 Act].

consul's naturalization authority and that respondents were therefore entitled to citizenship now as an equitable remedy (Pet. App. 1a-24a).

As we explained (Pet. 16-21), the Attorney General's actions were entirely permissible and did not violate the 1940 Act. More fundamentally, the court of appeals should not have even considered the legality of the Attorney General's conduct back in 1945. Our petition demonstrates (*id.* at 21-28) that the court below had no authority to order relief because, even if the 1940 Act gave respondents a right to citizenship, that right expired in 1946, and respondents did not apply for citizenship until more than three decades later (see Pet. App. 60a, 130a).

1. a. Respondents contend that the issues in this case are unimportant because the court of appeals' decision "will not affect a large number of persons" (Pang. Opp. 5).[2] That claim is erroneous; as we have explained (Pet. 15 & n.22; see also Pet. in *INS* v. *Hibi*, No. 72-1652, at 9), granting citizenship to Filipino veterans under the 1940 Act will directly affect thousands of Philippine veterans and their families. It will also indirectly affect many other Filipino nationals waiting for immigrant visas because of the likely increase in first preference visa applications.[3]

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[2] "Pang. Opp." refers to the brief in opposition filed by the 14 respondents in *Pangilinan, et al.* v. *INS* (caption below); "Lit. Opp." refers to the brief in opposition filed by the respondent in *Litonjua* v. *INS* (caption below). Litonjua makes various arguments applicable only to his case. In addition, he joins the arguments made by the Pangilinan respondents (see Lit. Opp. 3-4).

[3] Respondents quarrel with the government's figures (Pang. Opp. 6)—which are based upon Immigration and Naturalization Service statistics and actual naturalization petitions filed—but fail to provide any figures of their own. In the alternative, they claim that the numbers stated by the government are "insignificant" in comparison to the "millions" of aliens who will be legalized under the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (Pang. Opp. 8). That argument is all but frivolous. Under that theory, the INS should no longer contest *any* immigration or naturalization cases and should simply discontinue its congressionally mandated tasks. Cf. *INS* v. *Cardoza-Fonseca*, No. 85-782 (Mar. 9, 1987), slip op. 4-5 n.3 (holding that, notwithstanding the legalization program, it was appropriate to reach the asylum issue presented because it "will arise, and has arisen, in hosts of other asylum proceedings").

Respondents do not—and cannot—dispute our statement (Pet. 14) that the decision below conflicts with the Second Circuit's opinion in *Olegario* v. *United States*, 629 F.2d 204 (1980), cert. denied, 450 U.S. 980 (1981). And, as the dissenting judges below suggested (Pet. App. 40a), the seriousness of that conflict is enhanced, not undermined (as respondents maintain (Pang. Opp. 8)), by the fact that no reasonable Filipino veteran would seek naturalization in the Second Circuit in light of the inter-circuit conflict.

Respondents challenge our contention (Pet. 14, 23-25) that the court of appeals' decision conflicts with this Court's decision in *INS* v. *Hibi*, 414 U.S. 5 (1973) (Pang. Opp. 9-10). They point out that unlike the veteran in *Hibi*, they are challenging the constitutionality of the Attorney General's actions (*id.* at 10). But the court below did not reach the constitutional issue (Pet. App. 20a); rather, it held that the Attorney General denied them the right to apply for naturalization to which they were entitled *by statute*. That analysis is identical to that in the Ninth Circuit's *Hibi* opinion, which this Court reversed (414 U.S. 5, rev'g 475 F.2d 7 (1973)). See

Pet. 25 n.31 (quoting Ninth Circuit's *Hibi* decision). In the end, as the dissenting judges below recognized (Pet. App. 33a), the result reached by the court below "is precisely that rejected by the Supreme Court in *Hibi*." [4]

b. Respondents make little effort to defend the court's invocation of equitable authority. They do not explain, for example, how they were denied any "right" when they never attempted to avail themselves of the opportunity for citizenship while they were still eligible for overseas naturalization under the 1940 Act. Nor do they explain how a court can properly overlook their failure to apply for citizenship until more than three decades after the expiration of the 1940 Act. Cf. 8 U.S.C. 1440(d) (even timely applications under Section 701 of the 1940 Act, *i.e.*, those filed by December 31, 1946, must be decided under the 1952 immigration statute). And they provide no explanation of how, in light of the teachings of this Court (see Pet. 22-23 (citing cases)), the court of appeals had authority to ignore the current statutory requirements for citizenship.[5]

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[4] Respondents also contend (Pang. Opp. 11 n.3) that, because of the government's withdrawal of its appeal from *In re Naturalization of 68 Filipino War Veterans*, 406 F. Supp. 931 (N.D. Cal. 1975), and its subsequent accedence, on "grandfather" grounds, to the naturalization of veterans who filed petitions prior to that withdrawal, the application of *Hibi* to this case "would perpetuate an anomalous and unjust discrimination between two groups of veterans that do not differ from each other in any significant way." That argument merely restates, in a different form, the "collateral estoppel" theory that was rejected by this Court in *United States* v. *Mendoza*, 464 U.S. 154 (1984).

[5] Respondents concede that they are ineligible for citizenship under the current immigration statute (Pang. Opp. 12-13).

To justify the court of appeals' ruling, respondents rely heavily (Pang. Opp. 21-22) on this Court's decision in *Leedom* v. *Kyne*, 358 U.S. 184 (1958). That case, however, only underscores the flaw in respondents' position. In *Kyne*, the Court held that a district court had jurisdiction over a suit to vacate a decision of the National Labor Relations Board (NLRB), where the plaintiff claimed that the NLRB exceeded its statutory powers in violation of Section 9(b)(1) of the National Labor Relations Act, 29 U.S.C. 159 (b)(1). The plaintiff in *Kyne*, after unsuccessfully asserting its position before the NLRB, filed suit in district court almost immediately after the NLRB rendered its decision in 1956, and it asserted rights under a statute that was still in effect. See *Kyne* v. *Leedom*, 148 F. Supp. 597 (D.D.C. 1956), aff'd, 249 F.2d 490 (D.C. Cir. 1957), aff'd, 358 U.S. 184 (1958). It is inconceivable that this Court would have authorized the suit in *Kyne* had the plaintiff waited decades before seeking relief and had he sued under an expired statute. Cf. *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 481 (1964) (describing *Kyne* as a case having "narrow limits"). The fact that *Kyne* is the most "analogous" decision that respondents could find (see Pang. Opp. 21) thus only corroborates the dissenting judges' observation that the court below "stretche[d its] equity powers far beyond previously accepted limits" (Pet. App. 41a).

Nor are respondents persuasive in attempting to discount the disruption and distortion of the immigration and naturalization system that would result if they prevail in this case (see Pet. 15 & n.22). Naturalization examiners and courts, they suggest, "should have no more difficulty assessing the credibility of a veteran's claim than they have in judging any

other issue of fact" (Pang. Opp. 22). Yet they fail to recognize that the facts at issue—possession of the necessary qualifications under the 1940 Act—are at this point more than 40 years old. They describe the spillover effect of immigration rights accorded the spouses and children of naturalized veterans as "gradual and orderly" (*ibid.*), even though the visas obtained by the veterans' families will lengthen the wait of other Philippine nationals who wish to immigrate to this country. In short, respondents fail to show that a balancing of the equities supports them, let alone that the scales tip decidedly in their favor, as they must before equitable relief will be ordered against the government (see Pet. 26).

c. Respondents provide no valid basis to undermine the holding of the Second Circuit in *Olegario*, 629 F.2d at 227, that the authority granted to the Executive Branch to implement the 1940 Act "was sufficient to permit the executive to exercise discretion when confronted with a seemingly delicate foreign affairs matter." Indeed, respondents themselves concede (Pang. Opp. 18) that the statute "was broad enough to allow the INS some discretion with respect to the allocation of limited naturalization personnel." It is difficult to understand the statutory basis for respondents' position that the Executive Branch could make discretionary decisions for some purposes but had no authority to act in the face of a difficult foreign policy concern.

2. Respondent Litonjua raises three additional arguments unique to his case, all of which lack merit. First, he claims (Lit. Opp. 13-15) that he is different from the other 14 respondents because he made specific inquiries in Seattle, Washington, in July or August of 1946, while the 1940 Act was still in effect

(see Pet. 9-10 & n.16). However, those inquiries have no bearing on the issues involved here. This case involves whether respondents were denied a right to overseas naturalization. At the time Litonjua made inquiry, he was *ineligible* for overseas naturalization under Section 702 of the 1940 Act because he was no longer serving in the armed forces (see Pet. 9). Moreover, as we noted (Pet. 9-10 n.16), he ignored the instructions of the immigration officials and did not follow through with the application process while the statute was still in effect. In any event, he was treated by both the district court (Pet. App. 55a) and the court of appeals (Pet. App. 6a n.3) as a Category II veteran, and the court of appeals ordered his naturalization on the same theory that it ordered the naturalization of the other respondents.[6] Thus, the legal issues raised in this case are fully applicable to Litonjua.

Second, Litonjua erroneously argues (Lit. Opp. 4-5) that, in his case, a court could not properly find that foreign policy considerations were the basis for the withdrawal of naturalization authority from the Philippines, since the government offered no evidence on the subject at his naturalization hearing. The evidence that he claims was necessary concerned only the historical facts involving the administration of the 1940 Act, which are well settled and are recounted in numerous court decisions.[7]

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[6] The court of appeals did not reach Litonjua's claim that he should be treated as a Category I veteran (Pet. App. 6a n.3).

[7] See, *e.g.*, Pet. App. 2a-4a; *Hibi*, 414 U.S. at 9-11 (Douglas, J., dissenting); *Olegario*, 629 F.2d at 207-214; *In re Naturalization of 68 Filipino War Veterans*, 406 F. Supp. at 934-936.

Finally, Litonjua contends (Lit. Opp. 18-19) that this Court should deny review in his case because he has already been naturalized. But as we explained in our prior petition in this case (*INS* v. *Litonjua*, No. 82-1877, at 9 n.9 (involving issue of collateral estoppel)), Litonjua's naturalization occurred because of a delay by the court of appeals in recalling its mandate. As we indicated (*ibid.*), his case is not moot as a result of his having been naturalized, since reversal of the judgment of the court of appeals would enable the government to have his naturalization decree vacated pursuant to 8 U.S.C. 1451(j) and Fed. R. Civ. P. 60(b)(5). Cf. *INS* v. *Litonjua*, 465 U.S. 1001 (1984) (vacating and remanding court of appeals' judgment as to Litonjua as well as the other respondents, thereby treating him no differently even though he had already been naturalized). In short, all of the reasons we have given that show why the court of appeals erred in granting citizenship to respondents under the 1940 Act are fully applicable to Litonjua.

For the foregoing reasons and those given in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

CHARLES FRIED
Solicitor General

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v.

BONIFACIO LORENZANA MANZANO

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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66 pp

QUESTION PRESENTED

Whether Philippine veterans of World War II, whose opportunity to apply for American citizenship under greatly liberalized conditions expired in December 1946, are nonetheless currently entitled to citizenship because, during a nine-month period between October 1945 and August 1946, there was no designated examiner stationed in the Philippines to whom they could have applied for naturalization.

PARTIES TO THE PROCEEDINGS

Petitioner is the Immigration and Naturalization Service. Respondents are Antolin Punsalan Pangilinan, Panfilo Jabalde, Fidel Zosimo Usi Canilao, Antonio Patdo Tantay, Arcadio Revilla Nepomuceno, Dionisio Vallejos Lucas, Oliver Juan Posadas, Vicente Miranda Belizario, Rodolfo De Jesus Batac, Pedro Dumlao Ponciano, Cesar Jocson Ascalon, Winifredo Pableo Bello, Bonifacio Leoncio Zarcal, Benjamin Natividad Bonus, Mario Valderrama Litonjua, and Bonifacio Lorenzana Manzano.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-1992

IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

ANTOLIN PUNSALAN PANGILINAN, ET AL.

No. 86-2019

IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

BONIFACIO LORENZANA MANZANO

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals on remand from this Court in No. 86-1992 (Pet. App. 1a-24a[1]) is reported at 796 F.2d 1091. The dissenting opinion from the denial of rehearing en banc in No. 86-1992 (Pet. App. 29a-41a) is reported at 809 F.2d 1449. The original opinion of the court of appeals in No. 86-1992 (Pet. App. 42a-53a) is reported at 694 F.2d 603. The opinion of the court of appeals in No. 86-2019 (Manzano Pet. App. 1a-3a) is

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[1] "Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 86-1992. "Manzano Pet. App." refers to the appendix to the petition in No. 86-2019. "Lodging" refers to the lodging submitted to the Clerk with the petition in No. 86-1992.

unreported. The opinion of one district court (Pet. App. 54a-59a) is reported at 511 F. Supp. 630. The opinions of the other district courts (Pet. App. 60a-61a; Manzano Pet. App. 8a-10a) are unreported. The findings and recommendations of the designated naturalization examiners (Pet. App. 62a-127a, 130a-160a; Manzano Pet. App. 11a-38a) are likewise unreported.[2]

JURISDICTION

The judgments of the court of appeals in No. 86-1992 (Pet. App. 25a-27a) were entered on August 11, 1986. A petition for rehearing was denied on February 13, 1987 (Pet. App. 28a-29a). On May 5, 1987, Justice O'Connor extended the time within which to file a petition for a writ of certiorari in No. 86-1992 to and including June 13, 1987, and the petition was filed on June 12, 1987. The judgment of the court of appeals in No. 86-2019 (Manzano Pet. App. 4a) was entered on September 26, 1986. A petition for rehearing was denied on February 19, 1987

[2] This case involves three lawsuits: two appeals (both part of No. 86-1992) that were consolidated in the court of appeals (*Pungilinan* v. *INS* (caption below) and *Litonjua* v. *INS* (caption below)) and a third case (*INS* v. *Manzano*, No. 86-2019) that was consolidated by this Court with No. 86-1992. One naturalization examiner was assigned to handle the cases of all 14 respondents in *Pungilinan*. His legal analysis is essentially identical in each case. Accordingly, we have reproduced the complete findings and recommendations in only one of the cases, that of respondent Pangilinan (Pet. App. 62a-88a). With respect to the other 13 *Pungilinan* respondents, we have reproduced only individualized excerpts (*id.* at 89a-127a), but we have also lodged with the Clerk of the Court copies of the unedited versions (Lodging 1-325). In addition, we have lodged with the Clerk one set of appendices to the findings and conclusions in the *Pungilinan* cases (*id.* at 464-547), which are identical in each of the 14 cases. We have also reproduced the unedited findings and recommendations of the naturalization examiners in *Litonjua* (Pet. App. 130a-160a) and *Manzano* (Manzano Pet. App. 11a-38a).

(Manzano Pet. App. 5a). On May 5, 1987, Justice O'Connor extended the time within which to file a petition for a writ of certiorari in No. 86-2019 to and including June 19, 1987, and the petition was filed on that date. Both petitions were granted, and the cases consolidated by this Court, on October 5, 1987. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATUTES INVOLVED

Sections 701, 702, and 70[illegible] of the Nationality Act of 1940 (the 1940 Act), as amended by the Second War Powers Act, 1942, ch. 199, § 1001, 56 Stat. 182-183, 8 U.S.C. (Supp. V 1945) 1001, 1002, and 1005, and Section 310(e) of the Immigration and Nationality Act of 1952 (the 1952 Act), 8 U.S.C. 1421(e), are reproduced in the appendix to the petition in No. 86-1992 (Pet. App. 161a-163a) and in the appendix to this brief. Pertinent sections of three other statutory provisions are also set out in the appendix to this brief: the First Supplemental Surplus Appropriation Rescission Act, 1946, ch. 30, 60 Stat. 14; the Act of June 1, 1948, ch. 360, 62 Stat. 281 (amending the 1940 Act); and Section 329(a) and (d) of the 1952 Act, 8 U.S.C. 1440(a) and (d).

STATEMENT

Respondents are 16 Philippine veterans of World War II who, between June 1978 and April 1983, filed petitions for naturalization under Section 701 of the Nationality Act of 1940 (the 1940 Act), 8 U.S.C. (Supp. V 1945) 1001, as added by the Second War Powers Act, 1942, ch. 199, § 1001, 56 Stat 182 (Pet. App. 62a-127a, 130a-160a; Manzano Pet. App. 37a; Lodging 326-463).[3] Under that Section, aliens who served in the American Armed Forces

[3] The 1940 Act was repealed by Section 403(a)(42) of the Immigration and Nationality Act of 1952, ch. 477, 66 Stat. 280.

during World War II were permitted to apply for citizenship under greatly liberalized conditions. As part of the program, alien servicemen on active duty outside the United States were allowed under Section 702 of the Act to obtain naturalization overseas by applying to special examiners designated by the Commissioner of Immigration and Naturalization (the Commissioner) (8 U.S.C. (Supp. V 1945) 1002). As amended by Section 1(c)(1) of the Act of Dec. 28, 1945, ch. 590, 59 Stat. 658, Section 701 specified that any petition submitted thereunder had to be filed no later than December 31, 1946.[4]

[4] In a subsequent amendment to the 1940 Act, Act of June 1, 1948, ch. 360, 62 Stat. 281 (the 1948 Act), Congress again authorized certain members of the American Armed Forces to apply for citizenship under liberalized requirements. By its terms, the 1948 Act was inapplicable to respondents. Eligibility was limited by Section 1 to service personnel who were lawfully admitted to the United States for permanent residence after enlistment or who "at the time of enlistment or induction" were "in the United States or an outlying possession (including the Panama Canal Zone, but excluding the Philippine Islands)" (62 Stat. 282). Section 2 provided that the eligibility of any person who filed a timely petition for naturalization under Section 701 of the 1940 Act but whose application was still pending would be determined under the 1948 Act (62 Stat. 283).

In 1952, Congress passed comprehensive legislation relating to immigration and naturalization. Immigration and Nationality Act, 8 U.S.C. (& Supp. IV) 1101 *et seq.* (the 1952 Act). Under that Act, which is still in effect, Congress basically carried forward the provisions of the 1948 statute governing citizenship for military personnel. Section 329(a), 8 U.S.C. 1440(a), provides that, to be eligible for citizenship, the individual must have been located, at the time of enlistment or induction, "in the United States, the Canal Zone, American Samoa, or Swains Island" or he must have been lawfully admitted to the United States for permanent residence at any time subsequent to the enlistment or induction. Section 329(d), 8 U.S.C. 1440(d), provides that "[t]he eligibility for naturalization of any person who filed a petition for naturalization prior to January 1, 1947, under section 701 of the Nationality Act of 1940, as amended • • • and which is still pending on the effective date of this chapter, shall be determined in accordance with the provisions of this section." Respondents concede that they are ineligible for citizenship under the 1952 Act (see Pangilinan Br. in Opp. Cert. 12-13).

In 1961, Congress enacted Section 310(e), 8 U.S.C. 1421(e), which provides that "any" petition for naturalization filed after September 26, 1961, shall be determined in accordance with the 1952 Act.

Respondents made no effort to apply for (or even inquire about) overseas naturalization while on active duty in the Philippines (Pet. App. 4a-6a, 63a, 87a, 89a-129a, 131a-132a; Manzano Pet. App. 8a, 12a, 37a). Nor did they take legal action to enforce their alleged entitlement to citizenship under the 1940 Act until more than 30 years after the cutoff date. Nevertheless, the court of appeals ordered that all of them be granted citizenship.

1. a. The events leading to the present case began more than 40 years ago. In 1942, Congress amended the 1940 Act to provide liberalized conditions for the naturalization of aliens who served honorably in the United States Armed Forces during World War II. Section 701 exempted certain alien servicemen who served in areas outside the continental United States from various naturalization requirements, such as literacy in English and a period of residence in the United States. Section 702 provided for the overseas naturalization of persons serving in the United States Armed Forces who were eligible for naturalization under Section 701 but who were beyond the jurisdiction of the United States naturalization courts. Under Section 702, representatives designated by the Commissioner were authorized to receive petitions, conduct hearings, and grant naturalization outside the United States. Section 705 authorized the Commissioner, with the Attorney General's approval, to make such rules and regulations as were necessary to carry into effect the provisions of Sections 701-702. See *INS* v. *Hibi*, 414 U.S. 5, 6-7 (1973).

The great bulk of alien servicemen were naturalized by naturalization courts in this country, but thousands were naturalized pursuant to Section 702 by immigration officers traveling on rotation from post to post throughout England, Iceland, North Africa, and the islands of the Pacific.[5] The 1940 Act could not be carried out in the Philippines between 1942 and 1945 because of the Japanese occupation. Nonetheless, approximately 7000 Filipino service members were naturalized in places outside the Philippines.[6] See *Hibi*, 414 U.S. at 10 (Douglas, J., dissenting); *Olegario* v. *United States*, 629 F.2d 204, 209 (2d Cir. 1980), cert. denied, 450 U.S. 980 (1981); *In re Naturalization of 68 Filipino War Veterans*, 406 F. Supp. 931, 935 (N.D. Cal. 1975) (*68 Filipinos*).

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[5] A large number of the overseas naturalizations were performed by one individual, Dr. Henry Hazard (Lodging 523). Hazard naturalized 6574 alien servicemen between 1943 and 1945 (*id.* at 543-544). Between 1942 and 1944, 80,062 alien servicemen were naturalized by naturalization courts in this country (*id.* at 545-547).

According to a War Department circular, consular officials were designated in various locations to serve as "representatives" (apparently meaning examiners) under Section 702 (Lodging 477). We have been unable to confirm the accuracy of that statement, and we have found no statistics suggesting that such officials in fact naturalized alien servicemen. The courts have repeatedly stated—apparently correctly (see Lodging 522-523 (testimony of former INS Commissioner Carusi))—that Section 702 was implemented in most parts of the world under a post-to-post system in which an official traveled from one location to another. See *Hibi*, 414 U.S. at 10 (Douglas, J., dissenting); *Olegario* v. *United States*, 629 F.2d 204, 209 (2d Cir. 1980), cert. denied, 450 U.S. 980 (1981); *In re Naturalization of 68 Filipino War Veterans*, 406 F. Supp. 931, 935 (N.D. Cal. 1975). See also Pangilinan C.A. Reply Br. 17 (acknowledging "that other soldiers elsewhere may have had as little actual access as [respondents] to the naturalization official overseas").

[6] Between 1942 and 1944, 5919 Filipinos were naturalized by naturalization courts in this country (Lodging 545-547). Dr. Hazard naturalized 923 Filipinos at military posts outside the Philippines during his overseas visits (*id.* at 544).

Following the liberation of the Philippines by Allied Forces and the resolution of certain issues as to the applicability of Sections 701-702 to various Filipino servicemen,[7] the provisions of the 1940 Act were implemented in the Philippines. In early August 1945, the Immigration and Naturalization Service (INS) designated George Ennis, an American vice consul in Manila, to naturalize aliens pursuant to Section 702. The Philippine government subsequently expressed its concern to the State Department that the mass migration to this country of perhaps as many as 250,000 newly naturalized veterans would drain its soon-to-be independent country[8] of essential manpower and undermine post-war reconstruction efforts.[9]

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[7] One issue was whether service in the Philippine Commonwealth Army constituted service in the United States military forces for purposes of Section 701. A question existed because that army (which, with guerrilla units, was estimated at between approximately 166,000 and 270,000 men) was an arm of the Philippine government and was simply "call[ed] and order[ed] into the service of the armed forces of the United States" by a Presidential Order in 1941 (Lodging 482). In contrast, a much smaller unit known as the Philippine Scouts (consisting of about 6200 men) was a unit of the United States Army (see Lodging 506, 508). In 1945 the Attorney General determined that members of both Philippine units were covered by Section 701 (see *Olegario*, 629 F.2d at 209 n.3).

A second issue concerned the eligibility of Filipinos who had never resided in the United States. The Attorney General concluded that prior residence in the Philippines, then an American possession, satisfied the requirement of Section 701 that the applicant have been lawfully admitted into or otherwise entered "the United States, including its Territories and possessions." See *Olegario*, 629 F.2d at 209 n.3.

[8] The Philippines were scheduled to become an independent country on July 4, 1946. Philippine Independence Act of 1934, ch. 84, § 10(a), 48 Stat. 463.

[9] Although the Philippine government had apparently voiced concerns even prior to the designation of Ennis (see Lodging 503-504), those concerns took on significance only when that designation was

In September 1945, the Commissioner recommended to Attorney General Tom Clark that the problem be resolved by revoking Vice Consul Ennis's naturalization authority.[10] The Attorney General approved the recommendation, and naturalizations in the Philippines ceased in late October 1945 and did not begin again until nine months later, in August 1946. Pet. App. 3a, 44a; Lodging 502-506; *Olegario*, 629 F.2d at 209-210.[11]

In February 1946, Congress passed the First Supplemental Surplus Appropriation Rescission Act, 1946, ch. 30, 60 Stat. 6 (Rescission Act). In that statute, Congress appropriated $200 million for the Philippine Army (60 Stat. 14). However, in so doing it also provided that, with

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actually made. At that point, the Philippine government reiterated its objections in informal discussions with the State Department (see *ibid.*), and those objections were passed on to the Attorney General. At the time both countries had substantial interests in resolving the matter in confidence. The Philippines were pursuing independence and wished to preserve their population without antagonizing it. The United States desired to eliminate a source of friction and potential embarrassment with a newly emerging nation whose friendship was of considerable importance to the post-war balance of power in the Pacific.

[10] The INS took the position that Section 702 authorized but did not mandate the designation of overseas examiners (Lodging 513).

[11] Members of Congress were apparently advised of the Attorney General's action but made no effort to alter the decision. A memorandum of October 19, 1945, to the INS Commissioner from his Special Assistant (Lodging 506-507), which discussed the revocation of naturalization authority, indicated that Senator Hayden of the Senate Committee on Territories and Insular Affairs had expressed interest in the problem of naturalizing Filipino veterans because of his fear that the eligibility of large numbers of Filipino servicemen for veterans' benefits would escalate such benefits to unacceptable levels. The memorandum further reflected that Senator Hayden had discussed the matter with Senator Russell, who was then chairman of the Senate Immigration Committee. While the memorandum does not explicitly state that those Senators were informed of the revocation of naturalization authority, it gives that impression.

certain exceptions not relevant here, service in the Philippine Army pursuant to the July 26, 1941, order of the President was "not [to] be deemed to be or to have been service in the military or naval forces of the United States or any component thereof for the purposes of any law of the United States conferring rights, privileges, or benefits upon any person by reason of the service of such person * * *" (*ibid.*).

Five months after the enactment of the Rescission Act, the INS took the position, based on that Act, that Filipinos serving in the Commonwealth Army were no longer eligible for naturalization because they failed to qualify under Section 701 (see Lodging 515-517).[12] The following month, in August 1946, the INS designated a new naturalization official for the Philippines, P.J. Phillips, who naturalized approximately 4000 Filipinos between August 1946 and the December 31, 1946, cutoff date. Pet. App. 3a; *Olegario*, 629 F.2d at 211.[13]

b. In the past two decades there has been a stream of litigation as a result of belated efforts by Filipino veterans to obtain naturalization under the 1940 Act. These veterans have asserted that they were denied statutory and constitutional rights as a result of the nine-month absence

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[12] Under that revised interpretation, Philippine Scouts, who enlisted directly into the armed forces of the United States, remained eligible under Section 701. The government maintained its revised position until 1957, when a district court held that the Rescission Act did not take away the naturalization privileges of members of the Philippine Commonwealth Army (*In re Munoz*, 156 F. Supp. 184 (N.D. Cal. 1957)). See note 44, *infra*; see generally *Olegario*, 629 F.2d at 209-210 & nn.3, 5.

[13] In light of the INS's revised interpretation, reinstating naturalization authority did not pose the serious threat of a manpower drain that had concerned the Philippine officials. As noted, the vast majority of Filipino servicemen were members of the Commonwealth Army. Of the 16 respondents in this case, 14 served in the Commonwealth Army or its guerrilla units (Pet. App. 63a, 90a, 93a, 99a, 102a, 105a, 108a, 111a, 114a, 117a, 120a, 123a, 126a; Manzano Pet. App. 8a).

of a naturalization examiner in the Philippines. Several of these prior Filipino veteran cases provide pertinent background for the present case.

In *INS* v. *Hibi,* 475 F.2d 7, rev'd, 414 U.S. 5 (1973), the Ninth Circuit held that the government was equitably estopped from arguing that Hibi, a Filipino veteran, should be denied naturalization based on the statute's expiration date. This Court summarily reversed, holding that the government's revocation of Ennis's authority and its failure fully to publicize the benefits available to Filipino veterans under the 1940 Act did not give rise to an estoppel against the government.

Two years later, in *68 Filipinos,* the district court granted the petitions for naturalization of numerous Filipino veterans. The court classified the veterans into three groups: (1) "Category I": those who made affirmative but unsuccessful attempts to file petitions for naturalization while on active duty in the Philippines; (2) "Category II": those who, like respondents, had not sought naturalization in a timely manner but who could have qualified had they done so; and (3) "Category III": those who were unable to establish that they had ever qualified under Sections 701-702. The court granted the petitions of the Category I and II veterans but denied those of the Category III veterans (406 F. Supp. at 936-951).[14]

The government appealed the district court's decision in *68 Filipinos* and filed a brief, but it later withdrew the appeal after a new administration took office. The government thereafter re-evaluated its position once again and

[14] With respect to the Category I veterans, the court held that their petitions should be treated as "constructively filed" and that the government was equitably estopped to contest the petitions because of its failure to process the applications (406 F. Supp. at 938-939). With respect to the Category II veterans, the court held that they were entitled to citizenship because the government's revocation of the vice consul's authority violated their due process rights (*id.* at 948-951).

decided that it would thereafter challenge the petitions of Category II veterans.[15] Subsequently, in a case involving a different Filipino veteran, the Ninth Circuit held that because the government had withdrawn its appeal in *68 Filipinos,* it was collaterally estopped from contesting petitions for naturalization of other Filipino veterans who were applying under Sections 701-702 of the 1940 Act. This Court unanimously reversed, holding that, under the facts presented, collateral estoppel did not apply against the government based on an earlier lawsuit brought by a different party. *United States* v. *Mendoza,* 464 U.S. 154 (1984), rev'g 672 F.2d 1320 (9th Cir. 1982).

2. a. The present cases represent the third phase of the attempts of Filipino veterans to obtain naturalization under statutory provisions that expired decades ago. All of the respondents except Litonjua and Manzano filed their petitions in the United States District Court for the Northern District of California. Those 14 respondents[16] stipulated with the government that their legal claims were identical to those of the Category II veterans in *68 Filipinos* (Pet. App. 4a, 45a, 128a), since they were all on active duty in

[15] Since the *68 Filipinos* case, the government has adopted a policy of not opposing naturalization petitions of Category I veterans. The government also adopted a "grandfather rule" whereby it acceded to the holding of *68 Filipinos* with respect to petitions for naturalization of Category II veterans that were filed prior to the government's withdrawal of its appeal in *68 Filipinos.* The reason for the grandfather rule was that some veterans had apparently reached an agreement with the INS to hold their claims in abeyance pending the outcome of the appeal in *68 Filipinos.* The government was concerned that there was an implicit promise to those veterans that it would be bound by the result in *68 Filipinos* and that the veterans may have relied on that promise to their detriment.

[16] The *Pangilinan* case involves 14 veterans (referred to collectively as the "*Pangilinan* respondents"). The cases of *Litonjua* and *Manzano* involve only a single veteran each. See note 2, *supra.*

the Philippines for at least part of the period between October 1945 and August 1946, when there was no designated examiner in the Philippines, and they had made no effort to apply for (or inquire about) overseas naturalization while they were eligible under Section 702. Indeed, most of them did not even learn about the availability of citizenship for World War II veterans under the 1940 Act until the late 1970s.[17] One naturalization examiner was designated to handle the cases of all of the *Pangilinan* respondents. Rejecting the reasoning of the district court in *68 Filipinos,* he recommended against naturalization.[18] On September 24, 1980, upon consideration of the examiner's recommendation and the Second

[17] Respondent Pangilinan claimed in his petition for naturalization that after his discharge he "inquired with the Veterans Administration in 1946 to become a U.S. citizen, but they told [him he] was not eligible" (Lodging 334). He later stipulated with the government that he was a Category II veteran (Pet. App. 128a), and the designated naturalization examiner found that Pangilinan "offered no evidence to establish that he attempted to apply for or even inquired about naturalization while he was on active duty, and prior to the expiration of the law on December 31, 1946" (*id.* at 63a). The other 13 *Pangilinan* veterans conceded in their petitions that they did not even learn of the availability of naturalization for veterans until *after* 1946. Specifically, respondents Canilao and Tantay first learned in 1947 that they could have applied for citizenship (Lodging 353, 362); respondents Ascalon and Zarcal first learned in 1948 (*id.* at 428, 448); respondent Jabaide first learned in 1976 (*id.* at 344); respondents Lucas, Batac, Ponciano, Bello, and Bonus first learned in 1977 (*id.* at 380, 408, 419, 439, 455); respondents Nepomuceno and Belizario first learned in 1978 (*id.* at 371, 398); and respondent Posadas first learned "a few years" prior to 1979 (*id.* at 389).

[18] Specifically, he concluded that: (1) the petitions of the *Pangilinan* respondents were barred by Section 310(e) of the 1952 Act, 8 U.S.C. 1421(e), which precludes naturalization under expired or superseded statutory provisions; (2) the claims were barred by laches and by the veterans' failure to show that they were injured by the absence of an examiner; (3) the claims raised nonjusticiable political questions because the Attorney General's actions involved issues of foreign

Circuit's *Olegario* decision,[19] the district court denied the petitions of the 14 respondents[20] in a single order (Pet. App. 60a-61a). Those cases were consolidated for purposes of appeal.

b. Respondent Litonjua filed his petition in the United States District Court for the Southern District of California. Litonjua, who served in the Philippines from May 1941 to April 1946 as a member of the United States Navy, made no effort to apply for naturalization while on active duty. He made preliminary efforts to obtain citizenship during a visit to the United States after his discharge, but did not complete the petition process prior to the cutoff date (Pet. App. 131a-132a).[21] The naturalization examiner

policy that were within the sole prerogative of the Executive Branch; (4) the veterans' due process claims were nonmeritorious; and (5) their claims were barred by *Hibi.* Pet. App. 67a-87a.

[19] In *Olegario,* the Second Circuit rejected a Filipino veteran's claim of entitlement to citizenship under Section 701, holding, inter alia, that the decision to revoke Vice Consul Ennis's authority for foreign policy reasons was properly within the discretion of the Executive Branch and was not barred by the 1940 Act.

[20] The district court actually ruled on and denied 17 petitions, but only 14 of the veterans filed appeals.

[21] Specifically, Litonjua alleged that he made inquiries at the INS during late July or early August of 1946 while in Seattle as a civilian employee of the United States Army Transport Service. He apparently submitted some documents, although the nature of those documents is unclear. In any event, although Litonjua was instructed by the INS not to leave the Seattle area without first notifying that office, he left Seattle on August 17, 1946, without following those instructions. Litonjua made no effort to contact the INS until he returned to Seattle in January 1947 and was informed that the naturalization program for veterans had expired. Litonjua then waited 31 years before filing a petition for naturalization. Pet. App. 132a-133a, 158a. The court of appeals held that Litonjua was entitled to relief as a Category II veteran and for that reason did not reach his claim that he should be treated as a Category I veteran even though he did not pursue naturalization while overseas (*id.* at 6a n.3; see also *id.* at 45a-46a n.3).

recommended that Litonjua's petition be denied, giving reasons similar to those given by the examiner in *Pangilinan* (Pet. App. 130a-160a). The district court agreed and denied Litonjua's naturalization petition on April 9, 1981 (*id.* at 54a-59a). Although it concluded that Litonjua's claim was not barred by the political question doctrine, laches, or this Court's *Hibi* decision, the court followed *Olegario* and held that the Attorney General's revocation of the vice consul's authority was proper under the 1940 Act (*id.* at 56a-59a).

c. Like Litonjua, respondent Manzano filed his petition in the United States District Court for the Southern District of California. And Manzano, like all of the other respondents, was not a Category I veteran (as that term was used in *68 Filipinos*) because he made no effort to apply for or inquire about overseas naturalization while on active duty in the Philippines (Manzano Pet. App. 8a, 12a, 37a). Manzano claims that in July 1946, after completing his service, he inquired at the American Embassy in the Philippines about the possibility of obtaining citizenship but was told that there was no longer anyone present to assist him (*id.* at 12a). Manzano then waited 37 years—until 1983—before applying for citizenship under the 1940 Act (*id.* at 11a).

The naturalization examiner recommended that Manzano's petition for naturalization be denied on several grounds (Manzano Pet. App. 11a-38a).[22] The district court agreed and denied the petition (*id.* at 8a-10a).[23]

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[22] Those grounds were essentially the same as those relied upon by the examiners in *Pangilinan* and *Litonjua* (Manzano Pet. App. 11a-38a).

[23] The court rejected the government's argument that Manzano's claim was barred by laches (Manzano Pet. App. 9a). Nonetheless, relying on the Second Circuit's decision in *Olegario*, it held that the Attorney General, in revoking the vice consul's naturalization authority, had acted within the scope of the 1940 Act (*id.* at 8a-9a).

3. The *Pangilinan* respondents and Litonjua filed appeals in 1980 and 1981, respectively, and the court of appeals consolidated those cases (No. 86-1992). Manzano's appeal (No. 86-2019), filed later, was assigned to a different panel, which decided the case based on the court's 1986 decision in No. 86-1992.

a. In No. 86-1992, the court of appeals applied its *Mendoza* decision, which had not yet been overturned by this Court (see page 11, *supra*), and reversed the two district courts on collateral estoppel grounds (Pet. App. 42a-53a). After this Court reversed the Ninth Circuit in *Mendoza*, it vacated the court of appeals' collateral estoppel judgments in the *Pangilinan* and *Litonjua* lawsuits (*INS* v. *Litonjua*, 465 U.S. 1001 (1984), rev'g *sub nom. Barretto* v. *United States*, 694 F.2d 603 (9th Cir. 1982)),[24] thus setting the stage for the current phase of the litigation.

b. On remand from this Court, the court of appeals in No. 86-1992 did not reach respondents' constitutional claims. Rather, it "avoid[ed] deciding this substantial constitutional question" (Pet. App. 20a) and instead held that the revocation of Vice Consul Ennis's naturalization authority violated the 1940 Act and that, as a consequence, belated naturalization was appropriate as an equitable remedy (*id.* at 11a-24a).

At the outset, the court concluded, with no elaboration, that this Court's *Hibi* decision was not relevant because respondents were "rais[ing] statutory and constitutional arguments neither presented to nor addressed by the Supreme Court in *Hibi*" (Pet. App. 11a).[25] On the issue

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[24] Veteran Barretto is no longer part of this litigation because the court of appeals granted him citizenship for reasons unique to his case (see Pet. App. 51a-53a).

[25] The court also rejected the government's arguments that the issue was a nonjusticiable political question, that 8 U.S.C. 1421(e) precluded respondents' naturalization, and that respondents' petitions were barred by laches (Pet. App. 7a-10a).

whether the Attorney General lawfully revoked the vice consul's naturalization authority, the court held that "there is little room for doubt" that the Attorney General's action was contrary to " 'the expressed will of Congress' " (*id.* at 16a (citation omitted)).[26] The court stated that the language of Sections 702 and 705 was "mandatory, not discretionary," and contained "no express or implied delegation of authority to the Attorney General to deny the benefits of the Act to eligible aliens for any reason" (Pet. App. 16a (footnote omitted)). The court therefore refused to "find an implied intent to defer to the Attorney General's judgment that benefits under the Act should be withheld from Filipinos in response to postwar manpower concerns expressed by Philippine officials" (*id.* at 17a).

The court acknowledged (Pet. App. 20a-21a) that its interpretation of the 1940 Act conflicts with the Second Circuit's holding in *Olegario* that the Attorney General's action was permissible under that Act. It concluded, however, that the Second Circuit's analysis is "unpersuasive" (*id.* at 21a), and it noted that *Olegario* was decided before this Court stated in *INS* v. *Miranda*, 459 U.S. 14 (1982), that "the Attorney General's 'error was clear' when he revoked [the vice consul's] naturalization authority in 1945" (Pet. App. 21a).[27]

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[26] The Court took the phrase "the expressed will of Congress" from Justice Jackson's concurring opinion in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 637 (1952), which stated that "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb * * *."

[27] In *Miranda*, the Court held that the government's 18-month delay in processing an application for adjustment of status did not give rise to a claim of estoppel. No issue involving citizenship for Filipino veterans was involved. In reaching its conclusion regarding Miranda's claim, the Court stated (459 U.S. at 18) that, "[u]nlike *Montana* [v. *Kennedy*, 366 U.S. 308 (1961)] and *Hibi*, where the Government's error was clear, the evidence that the Government failed to fulfill its duty in this case is at best questionable." See notes 34 & 38, *infra*.

The court then addressed the question whether it had power to remedy the Attorney General's "transgression" by granting respondents naturalization notwithstanding the untimeliness of their petitions (Pet. App. 22a). It stated that under "deep-rooted precepts of equity," a federal court has "broad remedial powers" and is authorized to " 'adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action' " (*id.* at 22a-23a (citation omitted)). In the court's view, because "[t]here [was] simply no other way to restore the lost opportunity for citizenship that Congress offered [Filipino veterans] as a just reward for their military service in World War II," granting naturalization to respondents was "the only effective remedy available to 'rectify the agency action taken' " (*id.* at 23a (citation omitted)).

d. After the court of appeals rendered its decision in No. 86-1992, the panel in No. 86-2019 entered its ruling (Manzano Pet. App. 1a-3a).[28] Characterizing the present case as "nearly identical" to *Pangilinan* (*id.* at 2a), the court reversed the district court and remanded "for reconsideration consistent with" that decision (*id.* at 3a).

e. The court in No. 86-1992 subsequently denied the government's petition for rehearing and suggestion for rehearing en banc, with Judge Kozinski, writing for himself and seven other judges, dissenting from the denial of en banc rehearing (Pet. App. 29a-41a). In disputing the panel's conclusion (*id.* at 20a) that the 1940 Act gave Philippine servicemen a "right" to citizenship, the dissenting judges agreed with the Second Circuit in *Olegario*

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[28] The panel in No. 86-2019 had previously entered an order withholding submission of the appeal pending the court of appeals' decision in *Pangilinan* and *Litonjua* (Manzano Pet. App. 7a). The order stated that submission was withheld "pending decision in *Barretto* v. *United States*, No. 80-4543" (Manzano Pet. App. 7a). No. 80-4543 is the court's docket number for *Pangilinan*; *Barretto* is the name under which the prior consolidated decision was issued and reported. See page 15 & note 24, *supra*.

that, at most, the statute provided such servicemen " 'with *an opportunity* to become • • • citizen[s].' " *Id.* at 30a (emphasis added by dissent (quoting *Olegario*, 629 F.2d at 224)). The dissent also agreed with *Olegario* that the statute gave the Attorney General "very broad discretion" in "implementing the naturalization program," and that foreign relations was "a proper concern of the executive branch" in the decision to revoke the naturalization examiner's authority (Pet. App. 32a).[29]

In addition, the dissent stated (Pet. App. 33a) that the panel had merely used a different label to achieve precisely what had already been rejected by this Court in *Hibi*. It also maintained that, even aside from the teachings of *Hibi*, the panel's invocation of equity power was erroneous. It noted that, while equity courts have broad discretion to fashion a remedy, such discretion only arises "*once a right has been established*" (*id.* at 35a (emphasis in original)). Equity courts, the dissent asserted, have no authority to "enforce rights denied by statute" (*id.* at 36a). It pointed out that respondents failed to meet the statutory criteria for citizenship because their petitions were untimely (*ibid.*). The dissent concluded (*id.* at 41a) that the panel had "stretch[ed] the court's equity powers far beyond previously accepted limits."

f. Because the government had filed for rehearing in *Pangilinan*, it also filed a protective petition for rehearing in Manzano's case. The panel in that case stayed the disposition of the rehearing petition pending the resolution of the petition in *Pangilinan* (Manzano Pet. App. 6a). After the court of appeals denied the petition in *Pangilinan* (Pet. App. 28a-29a), the panel denied rehearing in Manzano's case (Manzano Pet. App. 5a).

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[29] The dissent noted that the 1940 Act "speaks in mandatory terms only in describing the steps the naturalization petitioner must take in applying for citizenship," and that "[i]n all other respects it • • • speaks in the permissive, leaving it to the 'Commissioner, with the approval of the Attorney General,' to establish the procedures for implementing the Act" (Pet. App. 31a (quoting 1940 Act, § 705)).

SUMMARY OF ARGUMENT

A. This Court's decision in *Hibi* forecloses the court of appeals' holding that the Attorney General's revocation of the vice consul's naturalization authority violated the 1940 Act and that conferral of citizenship is appropriate as an equitable remedy. In reversing the Ninth Circuit in *Hibi*, this Court held that the revocation of the vice consul's naturalization authority (as well as the failure fully to publicize the benefits accorded by Sections 701 and 702) did not estop the government from asserting that citizenship should be denied on the basis of Section 701's cutoff date (414 U.S. at 8-9). In substance, the Court rejected the very relief again ordered by the court below.

The fact that the veteran in *Hibi* characterized his claim as "equitable estoppel" does not meaningfully distinguish that case from this one, in which respondents seek "a remedy as a matter of equity" (Pangilinan C.A. Supp. Br. (2/14/85) 3). When a litigant seeks to estop the government from enforcing a statutory provision against him, he is seeking to prevent the operation of the statute itself. This is particularly true with respect to naturalization statutes, since the ultimate determination whether an alien has met the necessary conditions is made by the courts, not by the Executive Branch. Thus, the necessary import of this Court's decision in *Hibi* is that the Attorney General's alleged violation of the 1940 Act—namely, his revocation of the vice consul's naturalization authority—does not provide a court with equitable authority to ignore current statutory requirements for citizenship and to grant naturalization on the basis of an expired statute.

In the present case, the court of appeals used a somewhat different label, but it reached precisely the conclusion rejected in *Hibi*. The court held that the revocation of the vice consul's naturalization authority violated the 1940 Act and that Section 701's cutoff date could therefore be disregarded as a matter of equity (Pet. App. 11a-24a).

As the dissenting judges below correctly observed (Pet. App. 33a), however, "[t]here is no meaningful difference between saying that the government is equitably estopped from raising the statutory cutoff date and disregarding the cutoff date as a matter of equity."

B. Even if the court of appeals could correctly have distinguished *Hibi*, it could not properly overcome two additional obstacles to its granting of citizenship to respondents. First, it had to conclude that the Attorney General's revocation of the vice consul's naturalization authority violated the 1940 Act (Pet. App. 11a-21a). Second, it had to rule that a court of equity has authority to order citizenship as a result of such violation (*id.* at 21a-23a). Neither holding can withstand scrutiny.

1. The 1940 Act gave the Attorney General considerable discretion in implementing the program for overseas naturalization. Congress did not specify where naturalization examiners must be sent, or for how long. The action at issue here—the revocation of the vice consul's naturalization authority—was undertaken in response to concerns expressed by Philippine officials that their newly emerging country would suffer a critical manpower drain if large numbers of Philippine servicemen were free to apply for American citizenship under liberalized conditions (see Pet. App. 3a). That action was within the Attorney General's discretion for three related reasons.

First, since the statute did not speak, either explicitly or implicitly, to the foreign policy issue facing him, his interpretation of the statute that he was assigned by Congress to administer is entitled to considerable deference. See *INS* v. *Cardoza-Fonseca*, No. 85-782 (Mar. 9, 1987), slip op. 23-25 n.29 (quoting *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 844 (1984)). Second, because the Attorney General was acting in the area of foreign affairs, his actions must be viewed with even greater deference. See, *e.g.*,

Regan v. *Wald*, 468 U.S. 222, 242 (1984); *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-589 (1952). Third, Congress has since enacted various statutes that can only be read as supporting the Attorney General's action. Specifically, it passed two statutes subsequent to 1946 granting citizenship to World War II veterans, but it excluded persons, such as respondents, who enlisted or were inducted in the Philippines, and it made the exclusion retroactive to pending applications that had been timely filed under Section 701. Act of June 1, 1948, ch. 360, 62 Stat. 281; 1952 Act, § 329(a) and (d), 8 U.S.C. 1440(a) and (d). It also passed the Rescission Act in 1946, which provided, with certain exceptions not relevant here, that service in the Philippine Commonwealth Army did not constitute service in the United States Armed Forces for purposes of conferring rights or benefits. Congress's actions are thus fully consistent with the Attorney General's determination that he had authority to revoke the vice consul's naturalization authority for foreign policy reasons. See, *e.g.*, *Dames & Moore* v. *Regan*, 453 U.S. 654, 687 (1981); *Zemel* v. *Rusk*, 381 U.S. 1, 12 (1965).

2. In any event, even if the Attorney General exceeded his authority under the 1940 Act, the court of appeals lacked authority to order equitable relief. In a series of statutes, Congress made clear that Section 701's special naturalization program ended as of December 31, 1946, and that Philippine veterans, such as respondents, would thereafter be ineligible for naturalization unless they qualified under current law. First, Section 701 itself specified that all applications had to be filed by December 31, 1946. Second, as noted above, in 1948 Congress adopted a new liberalized citizenship program, but it specifically excluded from eligibility servicemen, such as respondents, who enlisted or were inducted in the Philippines. Congress also provided in that statute that all

applications still pending under the 1940 Act were to be governed by the 1948 Act. The provisions of the 1948 Act were essentially carried forward into the 1952 Act as Section 329, 8 U.S.C. 1440, and respondents concede that they do not qualify for citizenship under the 1952 Act (Pangilinan Br. in Opp. Cert. 12-13). Finally, in 1961 Congress amended the 1952 Act by adding Section 310(e), 8 U.S.C. 1421(e), which provides that "any" naturalization petition filed after that date is to be heard and determined in accordance with the requirements of the 1952 Act. Since those statutes, by their terms, preclude present day naturalization under the 1940 Act, the court of appeals' decision violated the basic principle of equity that a court may not contravene the mandate of a statute. See, *e.g.*, *Hedges* v. *Dixon County*, 150 U.S. 182, 192 (1893); *Seguros Banvenez, S.A.* v. *S/S Oliver Drescher*, 761 F.2d 855, 863 (2d Cir. 1985). See also *Fedorenko* v. *United States*, 449 U.S. 490, 506, 516-518 (1981) (indicating that a court has no authority to disregard statutory requirements for citizenship).

3. Finally, even if the court of appeals had the authority to order equitable relief, it should not have done so here. A balancing of the equities—which the court of appeals improperly failed to undertake (see *Eccles* v. *Peoples Bank*, 333 U.S. 426, 431 (1948))—plainly shows that equitable relief was inappropriate. To begin with, even if the Attorney General misjudged his authority to consider foreign policy concerns in carrying out the 1940 Act, his misjudgment cannot be characterized as egregious. On the other hand, respondents' allegation of injury is purely speculative, since they did not even know about the citizenship program while they were eligible for overseas naturalization. In addition, granting respondents' belated petitions would potentially open the way to similar requests by thousands of other Filipinos. At this late date,

naturalization examiners and courts would have difficulty assessing claims by Filipinos that they qualified for citizenship under the 1940 Act and that they would have applied had a naturalization examiner been available. Moreover, various family members of the veterans would be entitled to obtain visas, either on a "first preference" basis or without regard to quotas (see 8 U.S.C. 1151(b), 1153(a)(1)), thereby potentially distorting the immigration process established by Congress. Finally, respondents are not without recourse; if Congress should decide that Filipino war veterans are deserving of United States citizenship, it can enact appropriate legislation. It has refused to do so, however, for the past four decades.

ARGUMENT

RESPONDENTS ARE NOT ENTITLED TO CITIZENSHIP UNDER THE LONG-SINCE EXPIRED PROVISIONS OF THE NATIONALITY ACT OF 1940

Notwithstanding this Court's prior reversals in *Hibi* and *Mendoza*, the Ninth Circuit has, for the third time, ordered the naturalization of Philippine veterans of World War II under a statute that expired more than 40 years ago. Having unsuccessfully invoked the doctrines of equitable estoppel (*Hibi*) and collateral estoppel (*Mendoza*), it has turned this time to "the federal judiciary's traditional powers of equity" (Pet. App. 23a). The court first found "little room for doubt that the Attorney General's revocation of Vice Consul Ennis's authority was 'incompatible with the expressed will of Congress' " (*id.* at 16a (citations omitted)). It then concluded that "deep-rooted precepts of equity" enable it to order respondents' naturalization as "the only effective remedy available to 'rectify the agency action taken' " (*id.* at 23a (citation omitted)).

The court's latest analysis is even less defensible than its prior efforts. As the dissenting judges pointed out (Pet.

App. 35a, 39a), the court "proceed[ed] almost directly" from the invocation of its equity powers "to its conclusion that it can and must provide the relief [respondents] seek," acting on nothing more than "its conclusion that it has identified a problem and that it alone can provide an effective remedy." In holding that respondents are entitled to citizenship under the 1940 Act, the court of appeals committed what the dissenters aptly characterized (*id.* at 29a) as a "constellation of errors": it disregarded this Court's *Hibi* decision; it incorrectly held that the Attorney General's revocation of the vice consul's naturalization authority for foreign policy reasons contravened Congress's intent; and it acted contrary to basic principles of equity jurisprudence.

A. The Relief Ordered By The Court Of Appeals Is Foreclosed By *Hibi*

The court of appeals dismissed this Court's decision in *Hibi* as inapposite with the simple statement (Pet. App. 11a) that respondents "do not rely upon the doctrine of equitable estoppel. Rather they raise statutory and constitutional arguments neither presented to nor addressed by the Supreme Court in *Hibi*." However, as the dissenting judges below correctly observed (*id.* at 33a), while the panel "use[d] somewhat different language" in granting citizenship to respondents, the result "is precisely that rejected by [this] Court in *Hibi*."

In *Hibi* a Filipino veteran sought to estop the government "from alleging that the filing deadline in section 701 ha[d] passed or that 8 U.S.C. § 1421(e) preclude[d his] petition" (*INS* v. *Hibi*, 475 F.2d at 9).[10] The veteran

[10] The facts in the present case are in all relevant respects identical to those in *Hibi*. The only differences between the two cases concern length and nature of World War II service and the degree of untimeliness of the naturalization petitions. Those differences have no bearing on the equitable remedy that the court below granted to respondents; if anything, they place respondents in a worse equitable

contended that equitable relief was appropriate because the Attorney General violated the 1940 Act by revoking the vice consul's naturalization authority and by failing to notify him about the citizenship program (*id.* at 8, 10). The court of appeals agreed and held that Hibi should be granted citizenship under Section 701 notwithstanding that Section's December 31, 1946, cutoff date (*id.* at 10-11). This Court reversed, holding that the revocation of the vice consul's naturalization authority (as well as the failure fully to publicize the rights accorded by Sections 701 and 702) did not constitute "affirmative misconduct" that might warrant estopping the government "from denying citizenship" (414 U.S. at 8-9). The Court concluded its opinion by stating (*id.* at 9) unequivocally that "[r]espondent's effort to claim naturalization under a statute which by its terms had expired more than 20 years before he filed his lawsuit must therefore fail."

The mere fact that respondents have changed the label of the relief they seek from "equitable estoppel" to "a remedy as a matter of equity" (Pangilinan C.A. Supp. Br. (2/14/85) 3) does not distinguish this case from *Hibi*. As the dissenting judges observed (Pet. App. 33a), "[t]here is no meaningful difference between saying that the government is equitably estopped from raising the statutory cutoff date and disregarding the cutoff date as a matter of equity."

When a litigant seeks, as did Hibi, to estop the government from enforcing a statutory provision against him, it is the operation of the statute that he actually seeks to prevent. And if a statutory provision cannot be enforced, the public policy established by Congress in enacting that provision is undermined. It is for that reason that this Court

posture. Whereas Hibi filed his petition for naturalization in 1967 (414 U.S. at 5), the earliest petition in the present case was filed in 1978 (see page 3, *supra*).

in *Hibi* invoked the well-established principle that "the Government is not in a position identical to that of a private litigant with respect to its enforcement of laws enacted by Congress" (414 U.S. at 8). Furthermore, when a litigant is seeking naturalization, an estoppel claim is not in fact addressed solely to Executive Branch enforcement of a legislative provision, since the Executive Branch does not rule upon a naturalization petition. Petitions for naturalization are adjudicated by naturalization courts. The Executive—or, more specifically, the designated naturalization examiner—merely provides the court with a *non-binding* recommendation concerning the appropriate disposition of the citizenship application. See 8 U.S.C. 1446(b) and (d), 1447; *Tieri* v. *INS*, 457 F.2d 391, 392 (2d Cir. 1972).[31] Thus, while the veteran in *Hibi* alleged that "the Government was estopped from relying on the statutory time limit" of Section 701 (414 U.S. at 7), his real demand was for naturalization as an equitable remedy notwithstanding the cutoff date and his failure to meet present day requirements for citizenship. And this Court, in denying relief, based its decision not on the absence of any technical element of estoppel,[32] but on its conclusion that the Attorney General's action did not constitute affirmative misconduct.

Indeed, both the veteran in *Hibi* and the court of appeals in that case plainly understood that "equitable estoppel" was merely the label placed upon a more general request for equitable relief. In his opposition to the government's petition for a writ of certiorari, Hibi (who was represented by the lead counsel for 14 of the 16 respondents here) made substantially the same contentions

[31] In Hibi's case, for example, the designated examiner recommended against citizenship, but the district court rejected that recommendation and granted Hibi citizenship (see 414 U.S. at 5).

[32] The elements of estoppel are described in *Heckler* v. *Community Health Services, Inc.*, 467 U.S. 51, 59 (1984).

concerning the revocation of the vice consul's naturalization authority that respondents have urged (and the court below accepted) in the present case (Hibi Mem. in Opp. Cert. 3-7, *INS* v. *Hibi, supra*). He specifically disavowed any narrow or technical construction of his claim, arguing instead that "[e]quitable estoppel is only the name for a legal principle employed by the courts below to enforce [the] promise" of citizenship to alien servicemen, and that, "while the events of this case may be described in the traditional terminology of equitable estoppel, it is the overriding commands of justice and good conscience which make the difference" (*id.* at 12). Plainly, Hibi's contentions were not based on a narrow application of the traditional elements of estoppel.

Moreover, the reasoning of the court of appeals in *Hibi* is not meaningfully different from the court's reasoning in the present case. As in this case (Pet. App. 16a), the Ninth Circuit in *Hibi* first found that the Attorney General violated the 1940 Act. It held that Section 705 "was not discretionary" but instead "imposed a legal duty" upon the Attorney General "to make a representative available to naturalize non-citizen applicants while they were still serving in the armed forces" (475 F.2d at 10). It therefore held, as did the court here (see Pet. App. 21a-22a), that revocation of "the authority of the only representative who could have naturalized [Hibi] while he was still in the army" violated the "duty" of the Attorney General and the Commissioner "to carry into effect the purposes of section 702" (475 F.2d at 10).[33] The court then found, as did the court

[33] See also 475 F.2d at 11 (finding "no statutory language" that gave the Attorney General power to revoke "the authority of the only person designated to perform naturalizations in the Philippines"); compare Pet. App. 16a (footnote omitted) ("[T]he language of the statute * * * contains no express or implied delegation of authority to the Attorney General to deny the benefits of the Act to eligible aliens for any reason.").

below (Pet. App. 21a-23a), that the violation entitled the veteran to equitable relief, namely, citizenship. Specifically, the court in *Hibi* ruled that because the conduct of the Attorney General and the Commissioner "was in derogation of their duties to carry out an Act of Congress" (475 F.2d at 11), the government should be estopped from alleging that Section 701's cutoff date had passed or that Hibi's naturalization was precluded under the 1952 Act. In granting Hibi's petition, the court explained that its decision fell within a class of cases that have "invoke[d] equitable relief to permit one to obtain his rights of citizenship where those rights have been denied due to erroneous action on the part of administrative officials" (475 F.2d at 11). The reasoning of the Ninth Circuit in *Hibi* is thus, on all counts, analytically indistinguishable from its reasoning in the present case.

In sum, the necessary import of this Court's reversal of the Ninth Circuit in *Hibi*—and the Court's conclusion that Hibi's "effort to claim naturalization" under a long-since expired statute "must therefore fail" (414 U.S. at 9)—is that the Attorney General's revocation of the vice consul's naturalization authority does not provide a court with equitable authority to resurrect an expired statute and ignore current requirements for obtaining citizenship. That holding is dispositive in this case, and the court of appeals has offered no persuasive reason for failing to comply with it.[34] In finding *Hibi* inapposite, the court of appeals

[34] Respondents are no more successful than the court of appeals in their efforts to distinguish *Hibi*. In the court of appeals, they stated (Pangilinan C.A. Supp. Br. (2/14/85) 7-8) that their statutory argument was not controlled by *Hibi* because (1) *Hibi* preceded this Court's decision in *Miranda*, 459 U.S. at 18, in which the Court stated that in *Hibi*, "the Government's error was clear" (see page 16 & note 27, *supra*); and (2) *Hibi* preceded the government's decision not to appeal the district court's decision in *68 Filipinos* (see pages 10-11, *supra*). Those arguments are without merit. In *Miranda*, this Court in no way suggested that *Hibi* was wrongly decided; to the contrary, it reaffirmed that the Attorney General's conduct, even if error, provided no basis for equitably estopping the government. 459 U.S. at 18-19. Moreover, as discussed below (see note 38, *infra*), we believe that the court of appeals and respondents have read too much into the Court's reference in *Miranda* to the government conduct at issue in *Hibi*. Similarly, the government's decision not to appeal in *68 Filipinos* is simply irrelevant to whether *Hibi* is controlling. Respondents' argument is nothing more than a restatement of the collateral estoppel argument rejected by this Court in *United States* v. *Mendoza*, *supra* (see page 11, *supra*).

In this Court, respondents have offered a third ground for distinguishing *Hibi* (Pangilinan Br. in Opp. Cert. 11): that under this Court's decision in *Lyng* v. *Payne*, 476 U.S. 926 (1986)—a case not relied upon by the panel—the fact that a remedy resembles estoppel is "irrelevant" because respondents are not asserting estoppel. Contrary to their contention, however, *Payne* does not give respondents such an easy escape from the Court's holding in *Hibi*. In *Payne*, the Court merely stated that a litigant cannot be denied a remedy that is clearly afforded him *by statute* simply because the relief he seeks resembles equitable estoppel and he fails to meet the latter's more stringent requirements (476 U.S. at 935-937). The claim in *Payne*—which this Court ultimately rejected on the merits—was that the Secretary of Agriculture failed to give adequate notice of the availability of loans under a disaster relief program and that the plaintiffs were therefore entitled to relief under the Administrative Procedure Act, 5 U.S.C. 551 *et seq*. Here, by contrast, the court below did not base its remedy on a specific provision enacted by Congress; rather it invoked general equitable principles to provide relief that was *prohibited* by statute (see pages 41-42, *infra*). Nothing in *Payne* suggests that, in the absence of a statutory remedy, an equitable claim can be successively presented, based on the same asserted government misconduct, by merely requesting estoppel under the more general label of "equitable relief."

was, in the words of the dissenters (Pet. App. 33a), merely "substitut[ing] words for concepts."

B. The Court Of Appeals Had No Basis For Ordering Equitable Relief

The court of appeals' holding that *Hibi* was inapposite was only the first of three barriers that it had to overcome

in order to grant citizenship to respondents. It also had to find that the Attorney General's revocation of the vice consul's naturalization authority contravened Congress's intent in enacting Sections 701-705 (Pet. App. 11a-21a), and that, in light of that violation, awarding citizenship to respondents is within the power of a court of equity (*id.* at 21a-23a). In our view, the court of appeals erred on both scores. Accordingly, even if *Hibi* were not dispositive, the court of appeals still had no basis for granting respondents citizenship.

1. The Attorney General's Revocation Of The Vice Consul's Naturalization Authority Did Not Violate The 1940 Act

The court of appeals held that the Attorney General's revocation of the vice consul's naturalization authority violated the 1940 Act. In finding that his conduct "thwarted the will of Congress" (Pet. App. 20a), the court reasoned that (1) servicemen in the Philippines were entitled to overseas naturalization, (2) the statute gave the Attorney General no discretion to deny the benefits of the statute to any eligible serviceman, even for foreign policy reasons, and (3) by revoking the vice consul's naturalization authority, the Attorney General made it impossible for Filipino servicemen to avail themselves of the program (*id.* at 11a-21a).

The court's reasoning is seriously flawed. As we shall now show, Congress gave the Attorney General the responsibility for implementing Sections 701 and 702, and his actions with respect to the Philippines were lawful for three reasons. First, his decision is entitled to deference because he was construing a statute that he was charged by Congress to administer, and the issue facing him had not been addressed either in the terms of the Act or in its legislative history. Second, the Attorney General's decision is entitled to even greater deference because he was

responding to foreign policy concerns, an area in which courts are especially reluctant to second-guess the Executive Branch. Finally, Congress has never disapproved of the Attorney General's actions; in fact, it has taken several legislative steps that have implicitly ratified them. Taken together, these grounds provide a compelling basis for upholding the Attorney General's action.

a. The citizenship program established by Sections 701-702 gave the Attorney General and the Commissioner great responsibility and, correspondingly, considerable discretion. Section 705 provided that the Commissioner, with the Attorney General's approval, "shall prescribe and furnish such forms, and shall make such rules and regulations, as may be necessary to carry into effect the provisions of this chapter." As the dissenters correctly noted (Pet. App. 31a), "Section 702 of the Act speaks in mandatory terms only in describing the steps the naturalization petitioner must take in applying for citizenship. * * * In all other respects the statute speaks in the permissive," leaving it to the INS Commissioner, with the Attorney General's approval, to implement the Act.[35] Specifically, the Act nowhere specifies where naturalization examiners must be sent, or for how long. Instead, the broad discretion given to the Attorney General and the Commissioner in 1942 under Sections 701-702 was consistent with their overall authority under the 1940 Act for administering the naturalization laws and for making the necessary rules and regulations. See 8 U.S.C. (1940 ed.) 727(a) and (b).

In implementing Sections 701 and 702, the Attorney General was faced with a variety of questions involving the

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[35] For example, since no mandatory procedures, schedules, or timetables were prescribed, the Attorney General and the Commissioner were free to adopt a post-to-post rotation system for examiners, even though that system did not provide continuous availability of a naturalization examiner. See note 5, *supra; Olegario*, 629 F.2d at 226.

scope of coverage and the manner of implementation. In considering the foreign policy decision that he had to make in September 1945, it is illuminating to understand the decisions that confronted him in initially implementing the program in the Philippines.

When the Philippines were liberated in 1945, the Attorney General had to decide whether Congress intended Sections 701-702 to apply to Filipinos who had entered service in the Philippines, primarily as members of the Commonwealth Army (see note 7, *supra*). The benefits of those Sections were available only to servicemen serving "in the military or naval forces of the United States" (1940 Act, § 701). Members of the Philippine Commonwealth Army, however, were not members of the United States Armed Forces as such; rather, they were members of a unit that was called and ordered into the service of our armed forces in July 1941 by Presidential Order. See note 7, *supra*. It was therefore unclear whether such servicemen were eligible for overseas naturalization. In addition, the statute applied only to noncitizens who, at the time of enlistment or induction, were "residents" of the United States who had been "lawfully admitted into" or otherwise entered "the United States, including its Territories and possessions" (1940 Act, § 701). The statute did not specify whether the Philippines, which were soon to become an independent nation, were included within those provisions. Moreover, there appears to be nothing in the legislative history that clarifies either of these statutory ambiguities.[36]

[36] We have found no indication that Congress specifically considered these matters when it enacted Sections 701-702. The absence of explicit reference to the Philippines in those Sections was in contrast to the predecessor statute applicable to World War I veterans, which made clear that residence in the Philippines was deemed residence within the United States for purposes of that statute. See Act of May 9, 1918, ch. 69, § 1, 40 Stat. 542. Because of the thousands of individuals who would be affected if the statute applied to members of the Commonwealth Army (see note 7, *supra*), one would expect that Congress would have been more specific had it contemplated that the statute was to apply to such servicemen.

In addition, two major purposes of Sections 701-702 were arguably inapplicable to members of the Commonwealth Army. One purpose was to encourage and reward enlistments by aliens into our armed forces (see, *e.g.*, 88 Cong. Rec. 1643 (1942) (remarks of Rep. Dickstein); *id.* at 1797-1798 (remarks of Rep. Celler)). Philippine servicemen, however—particularly those serving in their own national army—were fighting primarily to ensure their own country's independence from Japanese aggression, and that independence was presumably to be their main reward (see note 44, *infra*). A second purpose was to give alien servicemen from enemy or enemy-occupied countries U.S. citizenship to protect them, if captured, from being treated as traitors or illegal combatants (see, *e.g.*, 88 Cong. Rec. 1797 (1942) (remarks of Rep. Celler)). However, that purpose appeared inapplicable to Filipinos because they were U.S. nationals, not aliens. See Philippine Independence Act of 1934, ch. 84, § 2(a)(1), 48 Stat. 456 (Independence Act); see generally 8 U.S.C. (1940 ed.) 501(b) (general definition of "national"); but cf. Independence Act, § 8(a)(1), 48 Stat. 462 (citizens of the Philippines were "considered as if they were aliens" for immigration purposes and were therefore subject to quota and visa restrictions).

Moreover, in contrast to Sections 701-702, another part of the same statute referred specifically to the Philippines. See Second War Powers Act, 1942, ch. 199, § 301, 56 Stat. 179-180. In addition, a provision of Section 702, as originally enacted, was inconsistent with application of the statute in the Philippines. As originally enacted, Section 702 provided that the record of overseas naturalization proceedings and a copy of the certificate of citizenship were to be forwarded for filing to the clerk of a naturalization court "in the district in which the petitioner is a resident" (§ 1001, 56 Stat. 183). Compliance with that provision would have been impossible in the Philippines, since there were no naturalization courts there. See generally 1940 Act, § 301(a), 8 U.S.C. (1940 ed.) 701(a). That provision was changed in 1944 to permit filing of the record "in the district designated by the petitioner." Act of Dec. 22, 1944, ch. 662, § 2, 58 Stat. 887. See Lodging 466 & n.95 (reproducing both versions of Section 702). However, that change was apparently made not to include Filipinos but rather as "a convenience for the soldier," who might want his citizenship "recorded in some court other than the court in whose jurisdiction the place of his residence was located at the time of his induction." S. Rep. 1232, 78th Cong., 2d Sess. 2 (1944).

Eventually, after considerable deliberation and analysis on the part of his subordinates (see Lodging 481-497), the Attorney General exercised his interpretative discretion and decided to extend the naturalization opportunity to all Philippine servicemen. That decision was not mandated by the terms of the statute, and it would have been entirely reasonable for him to have reached the opposite conclusion. On the other hand, the decision was permissible under a reasonable and generous interpretation of the statute.

b. The concerns of the Philippine government that the naturalization program would result in a manpower drain and therefore undermine post-war reconstruction efforts required the Attorney General to make a considerably different determination concerning congressional intent. The question at that point was whether Congress would want him to conduct the naturalization program on Philippine soil if to do so would be detrimental to our future relations with the Philippine government (see Lodging 504). Like his initial decision that the Act applied to the Philippines, his subsequent decision to revoke the vice consul's naturalization authority for foreign policy reasons was also within his statutory discretion. This was true for three related reasons.

First, as with his initial decision, he was acting in an area where the statute was silent. Just as Congress gave no clear indication whether the overseas naturalization program was to be applied in the Philippines, there was nothing in the statute to suggest that maintenance of the program in a foreign country was mandatory notwithstanding impediments or problems that might arise, such as the objections of that country's officials.[37] Put another way, the administration of the overseas naturalization

[37] Indeed, Congress's silence on whether the program was to apply in the Philippines in the first place gave the Attorney General even greater discretion in resolving the foreign policy issue that arose there.

program was left to the Attorney General; Congress did not specify the circumstances in which naturalization authority should be designated in a country or the circumstances in which it could be revoked. Consequently, " 'considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer.' " *INS* v. *Cardoza-Fonseca,* No. 85-782 (Mar. 9, 1987), slip op. 24 n.29 (quoting *Chevron U.S.A. Inc.* v. *NRDC,* 467 U.S. 837, 844 (1984)); see also *Lukhard* v. *Reed,* No. 85-1358 (Apr. 22, 1987), slip op. 7 n.3 (plurality opinion) (discussing *Chevron*); *INS* v. *Miranda,* 459 U.S. at 19 (citations omitted) (noting that "the INS is the agency primarily charged by Congress to implement the public policy underlying [the immigration laws]" and that, accordingly, "[a]ppropriate deference must be accorded its decisions").

Second, because the decision confronting the Attorney General was one involving foreign policy, the deference that a court must give is even greater than that required for a purely domestic decision.[38] This Court has stated that

[38] The court of appeals, in holding that the Attorney General's actions were not justified as an exercise of foreign policy discretion, gave several reasons, all of which are erroneous. First, it relied heavily on a comment by this Court in *Miranda*, 459 U.S. at 18, that in *Hibi*, "the Government's error was clear" (see Pet. App. 16a, 21a). See page 16 & note 27, *supra*. As the dissenters observed, however, "such heavy reliance on a stray remark made by the Court in an unrelated context by way of illustrating an entirely different point is misplaced. It is inconceivable that the Court resolved this important and difficult question in such an off-hand manner in a case where it was not argued, briefed or even at issue." Pet. App. 32a.

Second, the court noted (Pet. App. 18a n.12) that no one "with responsibility for foreign affairs participated" in the revocation decision. But the court erred in suggesting that only officials possessing formal responsibility for foreign affairs are entitled to make decisions affecting foreign policy. See, *e.g.*, *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 542-543 (1950); *Olegario*, 629 F.2d

"[m]atters relating 'to the conduct of foreign relations * * * are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.' " *Regan* v. *Wald*, 468 U.S. 222, 242 (1984) (quoting *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 589 (1952)).[39] This principle is particularly relevant to

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at 232.

Third, the court indicated (Pet. App. 18a) that the Philippines were not a proper subject for the exercise of foreign policy discretion because they were a territory in 1945 and thus under congressional regulation under Art. IV, § 3, Cl. 2 of the Constitution. But the independence of the Philippines was imminent, and the Attorney General's decision was clearly made in contemplation of relations with a soon-to-be independent nation.

Finally, the court erred (Pet. App. 18a) in drawing support from the fact that Congress, with the approval of Philippine officials, authorized the recruitment of 50,000 Filipinos to serve in our postwar occupation forces. Armed Forces Voluntary Recruitment Act of 1945, ch. 393, § 14, 59 Stat. 543. There is a significant difference between conferring U.S. citizenship on Filipino servicemen (resulting in a permanent loss of manpower to the Philippines) and the temporary loss of manpower resulting from service in the occupation forces in Japan. Indeed, members of Congress and Philippine officials contemplated that the Philippines would benefit by later having trained servicemen as the nucleus for a Philippine army. See *Second Supplemental Surplus Appropriation Rescission Bill, 1946: Hearings on H.R. 5604 Before the Subcomm. of the Senate Comm. on Appropriations*, 79th Cong., 2d Sess. 32 (1946) (remarks of Sen. Hayden) [hereinafter *1946 Hearings*]. See also *Olegario*, 629 F.2d at 227.

[39] Accord, *e.g.*, *Haig* v. *Agee*, 453 U.S. 280, 292 (1981) ("Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention."); *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936) (foreign policy decisionmaking is subject to "the very delicate, plenary and exclusive power of the President" and "does not require as a basis for its exercise an act of Congress * * *"); *Chicago & Southern Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) (explaining why courts should not second-guess sensitive foreign policy decisions of the President); see also *Zemel* v. *Rusk*, 381 U.S. 1, 17 (1965) (noting "the changeable and explosive nature" of foreign relations and "the fact that the Executive is immediately privy to information which cannot be swiftly presented to, evaluated by, and acted upon by the legislature").

immigration and naturalization matters. As this Court has recognized (*Mathews* v. *Diaz*, 426 U.S. 67, 81-82 (1976) (footnote omitted)), "[t]he reasons that preclude judicial review of political questions also dictate a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization."[40]

Because of the Executive's broad authority over foreign affairs, Congress need not expressly authorize every action taken. Thus, Congress's "silence is not to be equated with Congressional disapproval." *Haig* v. *Agee*, 453 U.S. 280, 291 (1981) (footnote omitted). Accord, *e.g.*, *Dames & Moore* v. *Regan*, 453 U.S. 654, 678 (1981). In a variety of circumstances, this Court has upheld Executive action taken on foreign policy grounds even in the absence of explicit congressional authorization.[41] Thus, because the

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[40] Accord, *e.g.*, *Harisiades* v. *Shaughnessy*, 342 U.S. at 588-589 (footnote omitted) (indicating that "any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations" and that such matters are "largely immune from judicial inquiry or interference"); *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 542 (1950) (citations omitted) (noting that the regulation of immigration is "inherent in the executive power to control the foreign affairs of the nation").

[41] See, *e.g.*, *Dames & Moore*, 453 U.S. at 654 (upholding executive agreement ending Iranian hostage crisis; portion of agreement suspending claims against Iran pending in U.S. courts upheld despite lack of explicit statutory authorization in light of past congressional acquiescence in similar settlement authority); *Agee*, 453 U.S. at 280 (upholding Executive's revocation of passport on national security grounds despite lack of explicit statutory authorization in light of congressional acquiescence in administrative construction of statute); *Zemel* v. *Rusk*, 381 U.S. 1 (1965) (upholding Secretary of State's refusal to validate passports for travel to Cuba based on general statutory authority to grant and issue passports and on Congress's failure, in enacting other passport-related legislation, to

Attorney General's decision involved a foreign policy matter, his action is entitled to even greater deference than that given to an Executive official who is implementing a grant of statutory authority in a purely domestic context.[42]

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correct the Executive's longstanding interpretation of the statute). See also *Japan Whaling Ass'n* v. *American Cetacean Society*, No. 85-954 (June 30, 1986) (upholding Secretary of Commerce's decision that applicable statutes did not compel him to certify that Japan had failed to comply with international whaling quotas); *Narenji* v. *Civiletti*, 617 F.2d 745, 747 (D.C. Cir. 1979) (upholding regulation requiring Iranian natives who were here for post-secondary education to supply certain information to immigration authorities; court relied upon Attorney General's "broad authority" under the immigration statute), cert. denied, 446 U.S. 957 (1980).

In *Olegario*, the Second Circuit applied these principles of deference to the Executive in foreign affairs in concluding that the Attorney General's revocation of the vice consul's naturalization authority did not violate Sections 701-702. It noted (629 F.2d at 226 (citation omitted)) that "Congress's silence * * * 'on a subject about which no one had suggested a need to speak' " should not be construed to deprive the Executive Branch of the power "to consider the foreign affairs ramifications of a particular mode of enforcement and to suspend implementation to avoid a confrontation." Rather, the court concluded (*id.* at 227), the authority granted to the Executive Branch to implement Sections 701-702 without specific guidelines or restrictions "was sufficient to permit the executive to exercise some discretion when confronted with a seemingly delicate foreign affairs matter."

[42] The reasons for not second-guessing the foreign policy decisions of the Executive Branch apply *a fortiori* when a court is passing judgment more than 40 years after the fact. It would impose a serious chilling effect on our relations with foreign governments if our courts could easily invalidate Executive foreign policy decisions made decades earlier. Moreover, it is far too easy for a court, many years later—faced with a record that is necessarily imperfect because of the passage of time—to minimize the difficult and sensitive issues involved. Contrary to the court of appeals' approach (Pet. App. 8a n.6), the proper inquiry is whether a court, reviewing this case *in 1945*,

Finally, the justification for second-guessing the Executive's actions is weakest where, as in this case, Congress has implicitly ratified those actions. This Court, in previously upholding Executive action involving foreign policy, has given considerable weight to Congress's failure to object to such action when enacting subsequent legislation in the same subject area. See, *e.g.*, *Dames & Moore*, 453 U.S. at 682 n.10, 687-688; *Agee*, 453 U.S. at 296-301; *Zemel* v. *Rusk*, 381 U.S. 1, 12 (1965). Here, as in those cases, the Court is "not confronted with a situation in which Congress has in some way resisted the exercise of Presidential authority." *Dames & Moore*, 453 U.S. at 688. See generally *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

Indeed, Congress has, at every turn, taken actions that are fully consistent with the revocation of the vice consul's naturalization authority.[43] Thus, in 1946, it passed the Rescission Act, which provided that service in the Commonwealth Army while it was called into the United States Army was, with certain enumerated exceptions not relevant here, not to be "deemed to be or to have been service in the military or naval forces of the United States" for the purposes of any law "conferring rights, privileges, or

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would properly have enjoined the Attorney General from revoking the vice consul's naturalization authority notwithstanding the pleas from Philippine officials. Unless a court should clearly have done so then—and would have been unquestionably correct in doing so—there can be no basis for a judgment 40 years later that the Attorney General's action was error.

[43] By the same token, it has not expressed disapproval of the Attorney General's action. As noted (see note 11, *supra*), an October 1945 memorandum suggests that at least two key Senators, Hayden and Russell, were informed of the Attorney General's action. Yet, no legislative efforts were made to reverse that decision. Moreover, Senator Russell expressed the view on the Senate floor in 1945 that Filipinos could not obtain citizenship without coming to the United States. No one questioned or disapproved of that statement. See 91 Cong. Rec. 12325 (1945).

benefits" by reason of service in the United States armed forces (60 Stat. 14). In the words of Senator Hayden, one of its co-authors, the provision "cancels any right which soldiers in the Philippine Army *may* have had to become citizens of the United States under the Nationality Act of 1940, as amended * * *." *Second Supplemental Surplus Appropriation Rescission Bill, 1946: Hearings on H.R. 5604 Before the Subcomm. of the Senate Comm. on Appropriations,* 79th Cong., 2d Sess. 60 (1946) (emphasis added) [hereinafter *1946 Hearings*].[44] Two years later, Congress passed a new statute offering citizenship to servicemen under liberalized conditions. Act of June 1, 1948, ch. 360, 62 Stat. 281 (the 1948 Act). Instead of repudiating the Attorney General's decision, however, it made clear that servicemen who enlisted in the Philippines were in-

[44] Senator Hayden described the rationale of the legislation as follows (*1946 Hearings* 60):

> * * * It was the view of the committee that the approximately 200,000 Filipinos who first and last served in that army did so because they fervently desired freedom for their country and not with the idea of acquiring the right to go to another country.
>
> That army consisted of 200,000 of the best citizens of the Philippines, who, to a large extent, hold the future of the islands in their hands. It would be the worst kind of public policy practically to invite them to leave their homes, where their position as patriots is recognized, and come to the United States, where, as immigrants, they would have to begin at the very bottom of the economic ladder to make their way upward. In the end it would be doing no favor to hold out such an inducement to leave the land they love and for which they fought so valiantly.

The court that decided *In re Munoz*, 156 F. Supp. 184 (N.D. Cal. 1957)—which held that the Rescission Act was not intended by Congress to affect the rights and privileges accorded by the naturalization laws (see note 12, *supra*)—apparently was not advised by either side of Senator Hayden's statements. The court relied solely on legislative history of a post-Rescission Act statute that made clear that the Rescission Act was not intended to exclude Filipinos from the benefits of the Missing Persons Act, ch. 166, 56 Stat. 143 (see 156 F. Supp. at 186). No similar clarifying legislation was enacted with respect to the naturalization of Filipino veterans.

eligible for that benefit—even if they made timely applications that were still pending—unless they later became lawful permanent residents of the United States.[45] When the present immigration statute was enacted in 1952, Congress carried forward the citizenship program for servicemen contained in the 1948 Act. 8 U.S.C. 1440(a) and (d). Again, Congress did not grant citizenship to individuals such as respondents; indeed, respondents concede that they are ineligible under the 1952 Act (see Pangilinan Br. in Opp. Cert. 12-13).

Congress's actions are thus entirely consistent with our submission that the Attorney General's conduct did not undermine the intent underlying Sections 701-702. The court therefore erred in concluding that "there is little room for doubt" that the revocation of the vice consul's naturalization authority was " 'incompatible with the expressed will of Congress' " (Pet. App. 16a (citations omitted)).

2. The Court Of Appeals' Invocation Of Equitable Authority Contravenes Congress's Intent, In Violation Of Basic Principles Of Equity

Even if the court of appeals were correct in characterizing the revocation of the vice consul's naturalization authority as "error" (Pet. App. 23a), it would nonetheless possess no authority to require the naturalization of respondents under the expired provisions of Section 701. Their naturalization would directly violate the commands of a series of statutes. First, Section 701 itself specified

[45] Section 1 provided that an alien serviceman was eligible for naturalization, inter alia, if "at the time of enlistment or induction [he] shall have been in the United States or an outlying possession (including the Panama Canal Zone, *but excluding the Philippine Islands*)" (62 Stat. 282 (emphasis added)). Section 2 provided that "[t]he eligibility for naturalization of any person who filed a petition for naturalization prior to January 1, 1947, under Section 701 of the Nationality Act of 1940 * * * and which is still pending on the date of approval of this Act, shall be determined in accordance with section [1]" (62 Stat. 283).

that all petitions thereunder had to be filed by December 31, 1946. Second, as noted above, in 1948 Congress adopted a new liberalized citizenship program, but it specifically excluded from eligibility individuals, such as respondents, who enlisted or were inducted in the Philippines; that exclusion was made retroactive to persons who applied for citizenship under Section 701 on or before December 31, 1946, but whose applications were still pending in 1948. The provisions of the 1948 Act were essentially carried forward into the 1952 Act as Section 329, 8 U.S.C. 1440. Section 329(a) limits current naturalization based on World War II military service to individuals who, at the time of enlistment or induction, were "in the United States, the Canal Zone, American Samoa, or Swains Island," or who, subsequent to enlistment, became lawful permanent residents of the United States. And Section 329(d) applies that limitation to still-pending applications that were timely filed pursuant to Section 701. Finally, in 1961 Congress amended the 1952 Act by passing Section 310(e), 8 U.S.C. 1421(e), which provides that "any" petition filed after the date of its enactment is to be heard and determined in accordance with the requirements of the 1952 Act.[46] These statutes make clear that a court has no authority to grant citizenship under the long-since expired provisions of the 1940 Act.

In ignoring the December 31, 1946, cutoff date and Congress's clear directive that citizenship requirements be addressed solely under current law, the court of appeals purported to be following "deep-rooted precepts of

[46] Section 310(e) was enacted because, in Congress's view, " '[t]he administration of two nationality laws simultaneously is cumbersome, inefficient, and unfair to other applicants for naturalization.' " *United States* v. *Pasion*, 524 F.2d 249, 252 (9th Cir. 1975) (quoting legislative history). Specifically, Congress acted in order to overrule various cases that had held that the 1952 Act did not take away benefits afforded under the 1940 Act. See generally *Olegario*, 629 F.2d at 211-212, 219-220.

equity" (Pet. App. 23a). What the court overlooked, however, was that its authority to order relief, "equitable" or other, was circumscribed by an elaborate statutory scheme governing naturalization. Even if a court of equity were completely free to act in the absence of any law to the contrary, its "flexibility" (see *id.* at 22a) must necessarily stop where the legislature has spoken, unless, of course, the legislation is itself unconstitutional—a contention that is not, and could not be, made in this case. Here, Congress has set forth detailed requirements that courts must follow in ruling on naturalization petitions. As the dissenting judges recognized (*id.* at 36a), Congress's intent must be carried out, regardless of whether the judiciary is sitting as a court of law or a court of equity.

The principle that a court of equity may not disregard the mandate of a statute is surely one of the most "deep-rooted precepts of equity." This Court stated almost a century ago that "[c]ourts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law." *Hedges* v. *Dixon County*, 150 U.S. 182, 192 (1893); accord, *e.g.*, *Thompson* v. *Allen County*, 115 U.S. 550, 555 (1885) (noting that a court may not grant a remedy that extends beyond what the law allows); *Rees* v. *City of Watertown*, 86 U.S. (19 Wall.) 107, 122 (1873) ("A court of equity cannot, by avowing that there is a right but no remedy known to the law, create a remedy in violation of law * * *.").[47] Further-

[47] See also *Seguros Banvenez, S.A.* v. *S/S Oliver Drescher*, 761 F.2d 855, 863 (2d Cir. 1985) (citations omitted) (pertinent inquiry is whether invocation of equitable authority " 'comport[s] to and remain[s] compatible with the prevailing legislative intent' "); *Wirtz* v. *Chase*, 400 F.2d 665, 670 (6th Cir. 1968) (citation omitted) (" 'The maxim [equity follows the law] is strictly applicable whenever the rights of the parties are clearly defined and established by law.' "); *Colonial Trust Co.* v. *Goggin*, 230 F.2d 634, 637 (9th Cir. 1955) (citation omitted) (" 'Neither a fiction nor a maxim may nullify a statute.' "); *United States* v. *Killoren*, 119 F.2d 364, 366 (8th Cir.) (citations omitted) (" 'The plain mandate of the law cannot be set aside because of considerations which may appeal to referee or judge as

more, that principle applies *a fortiori* in the naturalization context. This Court has repeatedly made clear that there is "no power * * * vested in the naturalization court to dispense with" any substantive requirement for naturalization. *United States* v. *Ness*, 245 U.S. 319, 324 (1917). Accordingly, " '[o]nce it has been determined that a person does not qualify for citizenship, * * * the district court has no discretion to ignore the defect and grant citizenship.' " *Fedorenko* v. *United States*, 449 U.S. 490, 517 (1981) (citation omitted). Accord, *e.g.*, *United States* v. *Ginsberg*, 243 U.S. 472, 474 (1917).[48]

There can be no doubt that the court of appeals violated these basic principles of equity. It ordered citizenship for respondents even though they cannot meet current statutory requirements for citizenship.[49] Moreover, the court's action can in no way be viewed as carrying out Congress's intent. Since favorable disposition of petitions that had been *timely* filed by Philippine servicemen under Section 701 was precluded if the petitions had not been adjudicated prior to the effective date of the 1948 Act, Congress could hardly be thought to have intended or expected that courts would grant naturalization decades later to veterans who, like respondents, did not even know about the program while they were eligible.

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falling within general principles of equity jurisprudence.' "), cert. denied, 314 U.S. 640 (1941).

[48] While this Court in *Hibi* left open the possibility that the government might be estopped from enforcing a requirement for citizenship if it engaged in affirmative misconduct, the Court concluded that the very conduct at issue in the present case—the revocation of the vice consul's naturalization authority—was *not* affirmative misconduct. Thus, any conceivable exception to the principles set forth in *Ness*, *Fedorenko*, and *Ginsberg* would not apply here.

[49] Indeed, since respondents did not attempt to apply for or make inquiry about overseas naturalization while they were eligible under Section 702 (see pages 11-12, 13, 14, *supra*), they cannot even argue that but for the Attorney General's actions they would have complied with all of the requirements of the 1940 Act.

3. A Balancing Of The Equities Establishes That Equitable Relief Is Inappropriate

The court's invocation of equitable authority is erroneous for yet another reason. As the dissenters noted (Pet. App. 33a), the court totally failed to balance the equities before ordering relief. Had it done so, it would have been compelled to deny relief. Accordingly, even if the court of appeals had the *power* to order equitable relief, it should not have done so in this case.

This Court has made clear that equitable relief is not required as a matter of course whenever a violation of rights is found. Rather, "[i]t is always the duty of a court of equity to strike a proper balance between the needs of the plaintiff and the consequences of giving the desired relief." *Eccles* v. *Peoples Bank*, 333 U.S. 426, 431 (1948); see also *Amoco Production Co.* v. *Gambell*, No. 85-1239 (Mar. 24, 1987), slip op. 9; *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 312 (1982); *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329-330 (1944); *Meredith* v. *Winter Haven*, 320 U.S. 228, 235 (1943). See generally D. Dobbs, *Remedies* § 2.4, at 52 (1973). Moreover, courts should be especially cautious in ordering equitable relief "where governmental action is involved" (*Eccles*, 333 U.S. at 431).

Here, equitable considerations weigh heavily against granting respondents citizenship. To grant them citizenship, it is necessary to disregard several statutory provisions (see pages 41-42, *supra*) that render them ineligible. And as this Court has recognized, "[w]hen the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined." *Heckler* v. *Community Health Services, Inc.*, 467 U.S. 51, 60 (1984). See also *Hibi*, 414 U.S. at 8. This is simply not a case—if, indeed, there ever is one—in which enforcement of the law (and thus compliance with the law) should be estopped.

In the first place, the revocation of the vice consul's naturalization authority was prompted by sensitive foreign

policy considerations. Even if the Attorney General misjudged his authority to consider foreign policy concerns in executing Sections 701-702, his misjudgment can hardly be characterized as egregious.[50]

In addition, respondents' claim that they were injured by the Attorney General's action is entirely speculative, since they did not even know about the program while they were eligible, let alone inquire about or attempt to apply for citizenship.[51] It is sheer conjecture to conclude that, had the examiner been present, word would have made its

[50] See *Hibi*, 414 U.S. at 8-9 (Attorney General's actions did not constitute affirmative misconduct); *Santiago* v. *INS*, 526 F.2d 488, 496 (9th Cir. 1975) (en banc) (Choy, J., dissenting) (explaining *Hibi* as a case in which the Attorney General's "decisions were so patently of the type committed to the executive branch" that, "[r]egardless of whether the Government's conduct constituted an abuse of discretion," the Supreme Court "was extremely reluctant to nullify them over 20 years later in order to relieve one individual instance of hardship"), cert. denied, 425 U.S. 971 (1976); Comment, *Estoppel Against the Government*, 1976 Utah L. Rev. 371, 381-382 (noting that the veteran in *Hibi* "could show almost no equities in his favor which required the Government to be estopped," whereas "the Government's arguments against estoppel were strong" because of the foreign policy considerations underlying the Attorney General's decision).

[51] It is fundamental that courts should not order equitable relief "unless the need for [such] relief is clear, not remote or speculative." *Eccles*, 333 U.S. at 431. See also *Berenyi* v. *District Director*, 385 U.S. 630, 637 (1967) (where doubt exists concerning granting of citizenship, it should be resolved in favor of the United States); *United States* v. *Manzi*, 276 U.S. 463, 467 (1928) (same). The concerns that caution against the granting of equitable relief when the claim is speculative are very similar to those reflected in this Court's standing decisions. See, *e.g.*, *Allen* v. *Wright*, 468 U.S. 737, 759 (1984) (holding that "[t]he links in the chain of causation between the challenged Government conduct and the asserted injury [were] far too weak for the chain as a whole to sustain respondents' standing"); *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 42-43 (1976); *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 165-168 (1972) (denying standing to black plaintiff to challenge a private club's discriminatory membership policies, where he did not claim that he had applied for and been denied membership in that club).

way to respondents that they could obtain United States citizenship under liberalized conditions. Indeed, an examiner was present in the Philippines for three months between August 1945 and October 1945, while all of the respondents were on active duty there (see Pet. App. 63a, 90a, 93a, 96a, 99a, 102a, 105a, 108a, 111a, 114a, 117a, 120a, 123a, 126a, 131a; Manzano Pet. App. 8a), yet none of them learned about the availability of citizenship under Sections 701 and 702.[52] Similarly, respondents cannot show that, but for the revocation of Vice Consul Ennis's authority, there would have been an examiner in place in the Philippines during the entire time that they were on active duty. Even the court of appeals recognized (Pet. App. 13a) that the 1940 Act did not "mandate[] the Attorney General to make naturalization examiners continuously available to alien servicemen wherever they may be stationed."[53] In fact, it is doubtful that the revocation left Philippine servicemen in a worse position over the long

[52] Nothing in the 1940 Act required that every eligible member of the armed forces be given personal notice of his eligibility. A War Department circular (No. 382) issued September 21, 1944, set forth the policy of the Army that non-citizens should be notified of their right to apply for citizenship at the time of induction and upon arrival at their first duty station. But the vast majority of respondents enlisted months or even years before that procedure was implemented (see Pet. App. 63a, 90a, 93a, 99a, 102a, 105a, 108a, 114a, 117a, 120a, 123a, 126a, 131a; Manzano Pet. App. 37a). Moreover, that procedure was inapplicable to the Philippines; rather, as stated in paragraph four of the circular, it was part of "[t]he general procedure to accomplish naturalization of noncitizens serving in continental United States, Alaska, Hawaii, Puerto Rico, or the Virgin Islands of the United States • • •." See Lodging 473-480 (reproducing circular). In any event, the court of appeals did not base its decision on the denial of any right of respondents to receive personal notice of the program.

[53] The court's emphasis (Pet. App. 6a, 11a) on the *nine-month* absence of an examiner in the Philippines (between October 1945 and August 1946) is, however, highly misleading. Not a single respondent was on active duty in the Philippines during the entire time that there was no examiner there (see *id.* at 63a, 90a, 93a, 96a, 99a, 102a, 105a,

run than alien servicemen in many other locations. Respondents, of course, had no opportunity to be naturalized in the Philippines during the period when there was no examiner there. However, they had an *uninterrupted* opportunity for naturalization during the three months that the vice consul possessed authority. This compared quite favorably to the merely *periodic* opportunity that was apparently available to alien servicemen in various other parts of the world. See note 5, *supra*.[54]

Furthermore, respondents are seeking to revive statutory provisions that expired more than 30 years before they filed their petitions.[55] Granting their belated petitions

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108a, 111a, 114a, 117a, 120a, 123a, 126a, 131a; Manzano Pet. App. 37a). Indeed, several of the respondents left the service—and were therefore ineligible for overseas naturalization—before even half of that nine-month period had passed. See, *e.g.*, Pet. App. 111a (Batac: left service in December 1945); *id.* at 93a (Canilao: left service in February 1946); *id.* at 99a (Nepomuceno: left service in February 1946). Under the Ninth Circuit's opinion, a veteran who was on active duty even *one day* when there was no examiner would be eligible for belated citizenship, even though there was a full-time examiner for three months before the revocation of the vice consul's naturalization authority. See *id.* at 52a-53a (court observed that a veteran on duty in the Philippines for even nine days in which there was no examiner would be entitled to citizenship).

[54] A court cannot properly ignore these causation problems by stating, as the court of appeals did (Pet. App. 20a), that the 1940 Act gave respondents a *right* to citizenship. Otherwise, every alien serviceman from World War II who desires citizenship could come to court today and claim his "right," whether he knew about the program or not. As the Second Circuit held in *Olegario* (629 F.2d at 223-224), Sections 701-702 did not grant "a vested right to citizenship," but merely provided a "mechanism" which extended an "opportunity" to apply for overseas naturalization under liberalized requirements.

[55] Because respondents waited so long, there is a strong argument that they are guilty of laches. See generally *Landsdale* v. *Smith*, 106 U.S. 391, 392 (1882); *Conagra, Inc.* v. *Singleton*, 743 F.2d 1508, 1517 (11th Cir. 1984). This is true not only of those who knew of the program in the late 1940s, but also those who did not actually learn about it until the 1970s (see note 17, *supra*). See generally *Community Health Services, Inc.*, 467 U.S. at 63 ("[T]hose who deal with the government

would open the way to similar requests by thousands of other Filipino veterans (or those claiming to be veterans).[56] In many cases, at this late date, naturalization examiners and the courts would have great difficulty in assessing the applicants' claims that they qualified under Sections 701-702 and that they would have sought naturalization back in 1945 or 1946 had an examiner been stationed in the Philippines during the period in question.[57]

Moreover, the naturalization of respondents and those similarly situated would have a spillover effect. Once the veterans obtain citizenship, their spouses and minor children would be entitled to visas without regard to quotas. In addition, the unmarried adult children of the veterans would be able to obtain "first preference" visas, thus possibly placing them ahead of other Filipinos awaiting visas under the quota system. See 8 U.S.C.

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are expected to know the law."); *Federal Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380, 384-385 (1947) (noting that individuals who seek to come within a statute or regulation are charged with knowledge of the contents of such statute or regulation, "regardless of actual knowledge").

[56] See Pet. 15 n.22 (discussing large number of cases that may be affected by the disposition of this case); see also Note, *Estopping the Government in Immigration Cases: The Immigration Estoppel Light Remains Cautionary Yellow*, 56 Notre Dame L. 731, 737 (1981) (footnotes omitted) (expressing opinion that the equities in *Hibi* favored the government because someone "who did not pursue his claim of citizenship for twenty-two years could not claim serious injustice," whereas a decision in his favor "could have resulted in successful claims by thousands of other Filipinos who were similarly situated" and could have "unduly harmed the public interest").

[57] In July 1973, a fire at the Military Personnel Record Center in St. Louis, Missouri, destroyed millions of Army records for the period between World War I and 1959. As the naturalization examiner for the *Pangilinan* respondents noted (Pet. App. 72a-73a), "[w]ithout military personnel records to verify alleged service the Government will be confronted with an administrative nightmare."

1151(b), 1153(a)(1). Awarding equitable relief to Filipino veterans under the now-expired provisions of the 1940 Act would thus threaten a serious distortion of both the naturalization and immigration policies established by Congress.

Finally, equitable relief is not respondents' only recourse. The court of appeals was profoundly wrong in asserting (Pet. App. 23a) that "[t]here is simply no other way to restore the lost opportunity for citizenship that Congress offered them * * * ." Should Congress conclude that respondents and those similarly situated deserve United States citizenship for their service during World War II, it is perfectly capable of providing relief through the legislative process. As the dissenting judges noted (*id.* at 40a n.2), the availability of a solution through Congress "lessens the justification for extraordinary judicial relief." And if Congress *refuses* to provide relief, as it has thus far,[58] that circumstance hardly provides a court of equity with justification to act for the purported purpose of carrying out Congress's intent.

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[58] In the first session of the 93d Congress, Congressman Burton introduced a bill (H.R. 11963, 93d Cong., 1st Sess. (1973)) that would have allowed Filipinos who served honorably in "any United States Armed Force" during World War II, along with their spouses and children, to be admitted to this country as lawful permanent residents. The same proposal was reintroduced by Congressman Anderson (H.R. 1512, 94th Cong., 1st Sess. (1975)), and by Congressman Burton (H.R. 1568, 96th Cong., 1st Sess. (1979)). More recently, Congressman Dymally introduced two bills (H.R. 4895, 98th Cong., 2d Sess. (1984) and H.R. 5875, 98th Cong., 2d Sess. (1984)) that would have extended naturalization rights to Filipino veterans notwithstanding the 1952 Act and the cutoff date of Section 701. To our knowledge, these proposals have not generated action either in committee or on the floor.

CONCLUSION

The judgments of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

STATUTES INVOLVED

1. Sections 701, 702, and 705 of the Nationality Act of 1940, as amended by the Second War Powers Act, ch. 199, § 1001, 56 Stat. 182-183, 8 U.S.C. (Supp. V 1945) 1001, 1002 and 1005, provided in pertinent part:[1]

> [Section 701.] * * * [A]ny person not a citizen, regardless of age, who has served or hereafter serves honorably in the military or naval forces of the United States during the present war and [w]ho shall have been at the time of his enlistment or induction a resident thereof and who (a) was lawfully admitted into the United States, including its Territories and possessions, or (b) having entered the United States, including its Territories and possessions, prior to September 1, 1943, being unable to establish lawful admission into the United States serves honorably in such forces beyond the continental limits of the United States or has so served may be naturalized upon compliance with all the requirements of the naturalization laws except that (1) no declaration of intention, no certificate of arrival for those described in group (b) hereof, and no period of residence within the United States or any State shall be required; (2) the petition for naturalization may be filed in any court having naturalization jurisdiction regardless of the residence of the petitioner; (3) the petitioner shall not be required to speak the English language, sign his petition in his own handwriting, or meet any educational test; * * * *Provided, however,* That * * * (3) the petition shall be filed not later than December 31, 1946. * * *

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[1] The Nationality Act of 1940 was repealed by Section 403(a)(42) of the Immigration and Nationality Act of 1952, ch. 477, 66 Stat. 280.

[Section 702.] During the present war, any person entitled to naturalization under section [701] of this [Act], who while serving honorably in the military * * * forces of the United States is not within the jurisdiction of any court authorized to naturalize aliens, may be naturalized in accordance with all the applicable provisions of section [701] without appearing before a naturalization court. The petition for naturalization of any petitioner under this section shall be made and sworn to before, and filed with, a representative of the Immigration and Naturalization Service designated by the Commissioner or a Deputy Commissioner, which designated representative is hereby authorized to receive such petition in behalf of the Service, to conduct hearings thereon, to take testimony concerning any matter touching or in any way affecting the admissibility of any such petitioner for naturalization, to call witnesses, to administer oaths, including the oath of the petitioner and his witnesses to the petition for naturalization and the oath of renunciation and allegiance prescribed by section [335] of this [Act], and to grant naturalization, and to issue certificates of citizenship: *Provided*, That the record of any proceedings hereunder, together with a copy of the certificate of citizenship shall be forwarded to and filed by the clerk of a naturalization court in the district designated by the petitioner and be made a part of the record of the court.

[Section 705.] The Commissioner, with the approval of the Attorney General, shall prescribe and furnish such forms, and shall make such rules and regulations, as may be necessary to carry into effect the provisions of this [Act].

2. The First Supplemental Surplus Appropriation Rescission Act, 1946, ch. 30, 60 Stat. 14, provides in pertinent part:

* * * * *

In addition to the transfers authorized by section 3 of the Military Appropriation Act, 1946, transfers of not to exceed the amounts hereinafter set forth may be made, with the approval of the Bureau of the Budget, from the appropriation "Ordnance Service and Supplies, Army", to the following appropriations:

* * * * *

Army of Philippines, $200,000,000: *Provided*, That service in the organized military forces of the Government of the Commonwealth of the Philippines, while such forces were in the service of the armed forces of the United States pursuant to the military order of the President of the United States dated July 26, 1941, shall not be deemed to be or to have been service in the military or naval forces of the United States or any component thereof for the purposes of any law of the United States conferring rights, privileges, or benefits upon any person by reason of the service of such person or the service of any other person in the military or naval forces of the United States or any component thereof, except benefits under (1) the National Service Life Insurance Act of 1940, as amended, under contracts heretofore entered into, and (2) laws adminstered by the Veterans' Administration providing for the payment of pensions on account of service-connected disability or death: *Provided further*, That such pensions shall be paid at the rate of one Philippine peso for each dollar authorized to be paid under the laws providing for such pensions: *Provided further*, That any payments heretofore made under any such law to or with respect to any member of the military forces of the Government of the Commonwealth of the Philippines who served in the service of the armed forces of the

United States shall not be deemed to be invalid by reason of the circumstances that his service was not service in the military or naval forces of the United States or any component thereof within the meaning of such law.

3. The Act of June 1, 1948, ch. 360, 62 Stat. 281, amending the 1940 Act, provided in pertinent part:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Nationality Act of 1940, as amended (54 Stat. 1137; 8 U.S.C. 907), be amended by adding a new section to be known as section 324A, as follows:

"Sec. 324A. (a) Any person not a citizen who has served honorably in an active-duty status in the military or naval forces of the United States during either World War I or during a period beginning September 1, 1939, and ending December 31, 1946, or who, if separated from such service, was separated under honorable conditions, may be naturalized as provided in this section if (1) at the time of enlistment or induction such person shall have been in the United States or an outlying possession (including the Panama Canal Zone, but excluding the Philippine Islands), or (2) at any time subsequent to enlistment or induction such person shall have been lawfully admitted to the United States for permanent residence. The executive department under which such person served shall determine whether persons have served honorably in an active-duty status, and whether separation from such service was under honorable conditions: *Provided, however,* That no person who is or has been separated from such service on account of alienage, or who was a conscientious objector who performed no military or naval duty whatever or

refused to wear the uniform, shall be regarded as having served honorably or having been separated under honorable conditions for the purposes of this section.

* * * * *

Sec. 2. The eligibility for naturalization of any person who filed a petition for naturalization prior to January 1, 1947, under section 701 of the Nationality Act of 1940, as amended (8 U.S.C., Supp. V, sec. 1001), and which is still pending on the date of approval of this Act, shall be determined in accordance with section 324A of the Nationality Act of 1940, as added by section 1 of this Act.

4. Section 329 of the 1952 Act, 8 U.S.C. 1440, provides in pertinent part:

(a) Any person who, while an alien or a noncitizen national of the United States, has served honorably in an active-duty status in the military, air, or naval forces of the United States during either World War I or during a period beginning September 1, 1939, and ending December 31, 1946, or during a period beginning June 25, 1950, and ending July 1, 1955, or during a period beginning February 28, 1961, and ending on a date designated by the President by Executive order as of the date of termination of the Vietnam hostilities, or thereafter during any other period which the President by Executive order shall designate as a period in which Armed Forces of the United States are or were engaged in military operations involving armed conflict with a hostile foreign force, and who, if separated from such service, was separated under honorable conditions, may be naturalized as provided in this section if (1) at the time of enlistment or induction such person shall have been in the United States, the Canal Zone, American Samoa, or Swains Island, whether or not he has been

lawfully admitted to the United States for permanent residence, or (2) at any time subsequent to enlistment or induction such person shall have been lawfully admitted to the United States for permanent residence. The executive department under which such person served shall determine whether persons have served honorably in an active duty status, and whether separation from such service was under honorable conditions: *Provided, however*, That no person who is or has been separated from such service on account of alienage, or who was a conscientious objector who performed no military, air, or naval duty whatever or refused to wear the uniform, shall be regarded as having served honorably or having been separated under honorable conditions for the purposes of this section. No period of service in the Armed Forces shall be made the basis of a petition for naturalization under this section if the applicant has previously been naturalized on the basis of the same period of service.

* * * * *

(d) The eligibility for naturalization of any person who filed a petition for naturalization prior to January 1, 1947, under section 701 of the Nationality Act of 1940, as amended (56 Stat. 182, 58 Stat. 886, 59 Stat. 658), and which is still pending on the effective date of this chapter, shall be determined in accordance with the provisions of this section.

5. Section 310(e) of the 1952 Act, 8 U.S.C. 1421(e), provides:

Notwithstanding the provisions of section 405(a)[2] any petition for naturalization filed on or after September 26, 1961, shall be heard and determined in accordance with the requirements of this subchapter.

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[2] Section 405(a) of the Immigration and Nationality Act of 1952, ch. 477, 66 Stat. 280, was a general savings clause that preserved the legal effectiveness of certain acts taken under provisions of prior law that were in other respects superseded by the 1952 Act.

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RESPONDENT'S

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No. 86-1992

In The
Supreme Court of the United States
October Term, 1987

IMMIGRATION AND NATURALIZATION SERVICE,
Petitioner,

v.

ANTOLIN PUNSALAN PANGILINAN, *et al.*,
Respondents.

On Writ of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE RESPONDENTS

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QUESTION PRESENTED

The government's statement of the question presented is not a full or fair description of the central issue in this case because it omits any reference to the reason why there was no naturalization representative in the Philippines during a critical period of time in 1945 and 1946. Thus, the real question presented is whether respondents, as veterans of United States military service during World War II, may proceed with petitions for naturalization under a wartime naturalization law, even though the law expired in 1946, because the Attorney General of the United States deliberately revoked the authority of a naturalization representative to consider such petitions in the Philippines in 1945 for the avowed purpose of preventing veterans like these respondents from becoming American citizens.

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STATEMENT

The government's brief contains a complete description of the statutes, events, and litigation which give rise to the issues presented for review. Brief for the Petitioner at 3-18.

SUMMARY OF ARGUMENT

1. The Attorney General acted in violation of the terms and purpose of §§ 701-705 of the Nationality Act of 1940 as added by Title X of the Second War Powers Act of 1942, 56 Stat. 182, when he deliberately withheld the services of naturalization representative from the Philippines during a period in 1945 and 1946 for the express purpose of preventing the naturalization there of qualified Filipino war veterans like these respondents. This Court has already described as clear error the government's failure to station a representative in the Philippines during all times that veterans could have applied under § 702 of the Act. *INS v. Miranda,* 459 U.S. 14, 18 (1982). The Attorney General's conduct was illegal because he acted without a delegation of authority from Congress. No such delegation appears in the language of the statute. And no such delegation may be implied from the fact that Congress did not specifically say that Filipino veterans should be naturalized over the objections of Philippine officials. While the Executive Branch's exercise of its foreign affairs powers calls for a high level of judicial deference, such deference does not extend to conduct which is contrary to the will of Con-

gress. Congress did not implicitly ratify the Attorney General's decision when it excluded Filipino veterans from the benefits of postwar naturalization legislation because there is no evidence that Congress knew that qualified veterans had been deprived of their right to apply under the 1940 Act amendments.

2. The naturalization of these respondents is not foreclosed by *INS v. Hibi*, 414 U.S. 5 (1973), even though it involved the same historical events and statutes giving rise to the issue presented here because these respondents have raised legal and factual questions this Court did not address in *Hibi*.

3. Nor are the claims of these respondents barred by § 310(e) of the current Immigration & Nationality Act, 8 U.S.C. § 1421(e), or by any other post war naturalization legislation, because there is no evidence that Congress knew about the Attorney General's conduct in 1945 when it enacted such legislation.

4. The federal courts have traditional broad equity powers to fashion remedies for the injuries caused by the violations of statutes. Moreover, a balance of equities in this case shows that the remedy granted by the court below was appropriate.

5. The 1940 Act amendments conferred upon respondents an opportunity to apply for naturalization which was protected by the due process clause of the fifth amendment. Having been deprived of that right, respondents should be granted the process which has always been due them—the processing and adjudication of petitions for naturalization under the 1940 Act.

6. Assuming the Attorney General had the authority to withhold the services of naturalization representatives under the 1940 Act, he impermissibly discriminated against Filipinos based upon their national origin in violation of their right to equal protection of the laws.

ARGUMENT

THE ATTORNEY GENERAL ACTED UNLAWFULLY WHEN HE ORDERED A HALT TO FURTHER NATURALIZATION IN THE PHILIPPINES IN 1945

When Congress added §§ 701-705 to the Nationality Act of 1940, it extended an offer of American citizenship to *all* qualified persons who would serve in the armed forces of the United States during World War II. The plain language of the statute allowed for no exceptions.

Nor is there any question about the means that Congress chose to implement its offer of citizenship for soldiers and sailors who would be on active duty overseas. The Commissioner of Immigration was to designate special representatives who would naturalize qualified applicants at American military and naval outposts abroad. Certainly, the Commissioner himself harbored no doubts about

his duty to carry out the overseas naturalization program for he sent representatives to all theaters of war to naturalize qualified applicants during the war. Nor did he have any question about his obligation to extend that program to the Philippines, once the Attorney General had determined that Filipinos who enlisted there were among the statute's intended beneficiaries. Consequently, it is impossible to escape the conclusion that the Attorney General acted contrary to the terms and purpose of the 1940 Act when he approved the Commissioner's suggestion to stop naturalizing veterans in the Philippines in 1945 for the avowed purpose of *preventing* Filipino veterans like these respondents from petitioning for naturalization.

Nevertheless, the INS argues now that what the Attorney General did was "within his statutory discretion" in light of the concerns allegedly expressed by Philippine officials that an exodus of manpower from the Philippines on the eve of its independence might result from the continuation of the naturalization program there. These concerns allowed the Attorney General to cut the program short, it is said, because his action involved the conduct of United States foreign policy and because Congress had not specifically expressed a desire to continue the program over the objections of Philippine officials. Moreover, the argument concludes, Congress in effect ratified the Attorney General's decision by excluding Filipinos like these respondents from certain postwar naturalization legislation. Brief for Petitioner at 30-41.

Respondents urge the Court to reject the INS arguments for the following reasons:

1. This Court has already characterized the government's failure to continue with the naturalization of Filipinos in the Philippines in 1945 as clear error. *INS v. Miranda*, 459 U.S. 14, 18 (1982). Consequently, the INS should be foreclosed from arguing that the Attorney General's conduct was not error because it cannot be both error and not error at the same time.

The Court should also reject the INS' effort to paint the Court's conclusion in *Miranda* as a careless, off hand remark made in a case where the Attorney General's decision to stop naturalizing veterans in the Philippines was not the issue. Brief as it was, the court's statement in *Miranda* served an important function. More particularly, it illustrated that the Court could not estop the government where the government's failure to fulfill a duty was questionable (*Miranda*) because it did not apply estoppel in a case where the government's "error was clear." (*Hibi*). To make that comparison, the Court had to mean what it said about *Hibi*, i.e., that the government's failure to make an authorized representative available in the Philippines in 1945 was clear error in the sense that it was a failure to fulfill a statutory obligation.

2. Authority for the Attorney General's decision to halt the overseas naturalization program in the Philippines cannot be implied from the failure of Congress to say specifically that the naturalization program should have continued in the face of objections by Philippine officials. To be sure, "considerable weight should be accorded to an executive department's construction of a statutory scheme it was entrusted to administer." *Chevron U.S.A. Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). But there is a significant difference between an agency's determination of how a stat-

ute is to be interpreted in the absence of clearly expressed congressional intent and an agency's determination not to carry out a statutory scheme altogether.

The difference is illustrated by three decisions which the Attorney General made in this case in 1945. The first two were that (1) all Filipinos who joined the armed forces in the Philippines were within the scope of the statute and (2) the law applied equally to Philippine Scouts and members of the Philippine Commonwealth Army. *See* Brief for Petitioner at 7 n.7. Having reached these conclusions, his plain duty was to see that the law was faithfully executed by making the services of naturalization representative available to qualified veterans on the scene.[1]

The Attorney General's third decision was to withhold the statute's benefits from veterans in the Philippines. This decision was of a kind and quality not contemplated by the rule of deference to an agency's construction of a particular statute. The decision was of a different kind because the Attorney General had already

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[1] As the court below noted, 796 F.2d at 1100:

> . . . the language of the statute is clear. It contains no express or implied delegation of authority to the Attorney General to deny the benefits of the Act to eligible aliens for any reason. Congress used language that was mandatory, not discretionary. It spoke, for example, of representatives 'designated' to process naturalization petitions overseas, not representatives who 'may be designated' § 702. It mandated that the Commissioner, with the approval of the Attorney General, 'shall (not may) prescribe and furnish such forms and shall make such rules and regulations as may be necessary to carry into effect the provisions of this Act.' § 705.

determined, as a matter of statutory construction, that Congress meant to include Filipino veterans like these respondents in its offer of citizenship. Consequently, when the Attorney General decided to prevent them from petitioning for naturalization, he was not interpreting the law, but excluding from its benefits some of the people Congress had meant to include. In this respect, he was impermissibly acting as a lawmaker without a delegation of authority or mandate from Congress. *Commissioner v. Acker*, 361 U.S. 87, 92 (1959).

There is, in any event, ample evidence that Congress did not mean its offer of citizenship to be thwarted by the objections of Philippine officials. First of all, its offer of citizenship was made on March 29, 1942, at the very moment when the battles of Bataan and Corregidor were raging and the heroic exploits of Filipino soldiers and their American comrades were making banner headlines across the United States. Second, Congress obviously knew when it passed the 1940 Act amendments that the Philippines would become independent after the war. It also must have known that large numbers of Filipino soldiers had been inducted into the army of the United States by President Roosevelt's executive order in July 1941 as authorized by the Philippines Independence Act of 1934, 48 Stat. 463.

It is also significant that the offer of citizenship was extended not to aliens but to any member of armed forces "not a citizen." Use of the quoted term is significant because natives of the Philippines were then the largest group of people by far who were neither aliens nor citizens. They were instead non-citizen nationals of the United States. Had the term "alien" been used, Fili-

pinos might not have qualified. Finally, § 701 was made applicable specifically to veterans who were in either the United States proper or its territories or possessions. As the Court of Appeals noted, the Philippines was then the largest United States possession and provided a reservoir of manpower far larger than all others put together. In light of all the foregoing circumstances, it was not likely that Congress intended to exclude Filipino veterans from the statute's benefits, for any reason.

3. If the Attorney General's decision to stop the naturalization of veterans in the Philippines in 1945 was indeed error, it is not transformed into legitimate conduct because it may have been prompted by foreign policy concerns.

Of course, a higher level of deference may be given to administrative action in the area of foreign affairs. But the general rule does not immunize from judicial review the issue whether the executive exceeded its powers by such conduct. *See Baker v. Carr*, 369 U.S. 186, 211 (1961). Thus, as extensive as the foreign affairs powers of the Executive Branch may be, they have never justified administrative action taken in contravention of a statute. In fact, whenever deference has been paid by this Court to administrative action in the field of foreign affairs, it has been only upon finding that the authority to act was expressly or impliedly delegated by Congress.[2]

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[2] Thus in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), there was no doubt that Congress had delegated to the President the power to trigger by proclamation the sanctions provided by Congress against the sale of arms to participants in a South American war. The only issue was whether

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the delegation was lawful. In *Regan v. Wald*, 468 U.S. 222 (1984), this court found statutory support for a Treasury Department regulation barring certain currency transactions with Cuba. *Dames & Moore v. Regan*, 453 U.S. 654 (1981), upheld an administrative order suspending the claims of American citizens then pending in federal courts against the government of Iran. Although Congress had not explicitly authorized such an order, this court held that Congress had done so impliedly because of its acquiescence in a long standing practice of the Executive Branch to settle claims of American citizens against foreign governments. In *Haig v. Agee*, 453 U.S. 280 (1981), the issue was whether the Secretary of State exceeded his power by revoking Agee's passport on the ground that Agee's conduct abroad was endangering national security and interfering with the nation's foreign policy. Although the Passport Act of 1926 did not expressly authorize the Secretary's action, his action was affirmed because of a long history of congressional acquiescence in the State Department's revocation of passports on national security grounds. *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103 (1948), involved a very plain delegation of authority from Congress to the Civil Aeronautics Board and the President to establish airline routes between the United States and foreign countries. In *Narenji v. Civiletti*, 617 F. 2d 745 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 957 (1980), a regulation that discriminated against Iranian students during the American hostage crisis was upheld on the ground that Congress had impliedly delegated the authority for the regulation in light of the express grant to the Attorney General to regulate nonimmigrants such as foreign students. In *Japan Whaling Association v. American Cetacean Society*, — U.S. —, 106 S.Ct. 2860 (1986), this court found that action taken by the Secretary of Commerce was consistent with a treaty for the protection of whales. In *Zemel v. Rusk*, 381 U.S. 1 (1965), this Court concluded that because Congress had known of a State Department practice to preclude the use of American passports for travel to certain foreign countries for foreign policy or national security reasons, Congress had impliedly consented to the practice when it enacted passport legislation. *Matthews v. Diaz*, 426 U.S. 67 (1976), and *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952), concerned the validity of acts of Congress, one being a provision regulating medicare benefits to resident aliens, the other being a provision for the deportation of former communist party members. Thus, the authority of administrative officials to take action in the absence of a delegation of authority from Congress was not an issue at all.

However the language of the 1940 Act amendments in this case certainly expressed no delegation of authority to withhold the statutory benefits from any qualified applicant. Moreover, there had been no pattern of Congressional acquiescence in administrative conduct from which a delegation of authority might be implied. Absent such a delegation of authority, the Attorney General's decision must be construed as incompatible with the will of Congress. This is particularly true when, as here, Congress has exercised the plenary authority it derives from the Constitution in the area of naturalization. In other words, Congress, and only Congress, can decide who is to be naturalized. Once it has made that choice, as it did here with respect to Filipino war veterans, the Attorney General had no authority to decide otherwise, for any reason. For his power was at its "lowest ebb" and courts can sustain it only by "disabling Congress from acting on the subject." *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 637-638 (Jackson, J., concurring).

4. The authority of the Attorney General to stop naturalizing qualified Filipino veterans cannot be found in the proposition put forward by the INS that Congress "implicitly ratified" his decision when it enacted post-war legislation excluding such veterans from naturalization based on wartime military service.[3] Brief for Petitioner at 39-41.

No such ratification may be implied because there is no evidence that Congress knew of the Attorney General's

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[3] First Supplemental Surplus Appropriation Rescission Act, 1946, ch. 30, 60 Stat. 6; Act of June 1, 1948, ch. 360, 62 Stat. 281; § 329(d) of the Immigration & Nationality Act, 8 U.S.C. 1440(d).

conduct when it enacted that legislation. For obvious reasons, Congress could not ratify conduct it knew nothing about. In that respect, the INS is on shaky ground when it suggests that an immigration official's memorandum, written at the time, indicates that members of Congress were "apparently advised" of the Attorney General's decision or, at least, that the memo "gives that impression." Brief of Petitioner at 8 n. 11 and Lodging at 506-07. If anything, the memorandum leads to the opposite conclusion, as a close look will reveal.

Written by Edward Shaughnessy, special assistant to the Commissioner of Immigration on October 19, 1945, the memo begins with a recitation of the events leading to the Attorney General's decision. It then refers to a conversation with Senator Hayden of the Senate Committee on Territories and Insular Affairs, in which the senator states his concern about large numbers of Filipinos who were or soon would be "covered into" the United States Army and the potential cost to the government if their service were construed as being with United States forces. Mr. Shaughnessy continued with his paraphrase of the senator's comments in the following way (emphasis added):

> He [Sen. Hayden] says it is a very serious situation and he has been advised that if something is not done by this Government, pensions and other benefits running to this group will amount to a billion and a half dollars. He states he appreciates that this end of the problem does not belong to us but he hands it on to us for our general information and with the request that the Attorney General and the War Department *come to some definite conclusions.* He has suggested

to Senator Russell that a bill be introduced providing, in substance, that inasmuch as hostilities have ceased the benefits of Title X shall cease to run in the cases of persons covered in the United States Army *after the date* of the enactment of the proposed measure.

Senator Hayden's suggestion that the War Department and Attorney General "come to some conclusion" about the situation hardly manifests his knowledge that the Attorney General had already "come to some conclusion" by halting the naturalization of Filipino veterans.

Senator Hayden's comments are significant for another reason as well. For he notes that the intent of the forthcoming legislation would be prospective only; that it would prohibit the granting of veterans benefits only *after the date* of the proposed measure. In short, whatever benefits the 1946 Recission Act was meant to cut off for the Philippine Commonwealth soldiers, it was not meant to ratify the deprivation of rights under the 1940 Act which had already taken place.

THE NATURALIZATION OF THESE RESPONDENTS IS NOT BARRED BY INS v. HIBI OR BY THE ENACTMENT OF § 310(e) OR ANY OTHER LEGISLATION

1. *INS v. Hibi* does not foreclose the naturalization of these respondents because the issues they raise, both legal and factual, were not addressed by this Court in *Hibi*. Of course, the two cases are founded on the same historical circumstances and, like Mr. Hibi, these veterans are seeking naturalization as their only appropriate rem-

edy. But the legal question is different because, unlike Mr. Hibi who rested his case on the principle of equitable estoppel, these respondents have consistently raised the constitutional arguments that the Attorney General's decision to prevent them from filing petitions for naturalization in 1945 deprived them of due process and the equal protection of the laws. Since this Court did not consider these questions in *Hibi*, there is nothing in *Hibi* which precludes it from doing so now.

On a factual level, respondents have argued that *Hibi* is not controlling because of the characterization given to the 1945 events by the majority opinion in *Hibi*. More particularly, the majority characterized the government's conduct as a failure to timely advise Mr. Hibi of his right to apply for naturalization and a "failure to provide a naturalization representative in the Philippines during all of the time that respondent [Hibi] and those in his class were eligible for naturalization." 414 U.S. 7-8. The majority, in other words, saw the government's conduct in terms of neglect.[4]

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[4] The court's conclusion that the cut-off date of the 1940 Act had to be enforced against Mr. Hibi was premised on the general rule found in *Utah Power & Light Co. v. United States*, 243 U.S. 389, 409 (1917), that "neglect of duty" on the part of federal officials does not allow the courts to refrain from enforcing a public right or from protecting a public interest, the right or interest in *Hibi* being enforcement of the 1940 Act cut-off date. While the majority in *Hibi* said that "affirmative misconduct" by federal officials could mandate a different result, it concluded that the "failure to fully publicize the rights which Congress accorded under the Act of 1940, or the failure to have stationed in the Philippine Islands during all of the time those rights were available an authorized naturalization representative" did not rise to that level. 414 U.S. at 8-9.

In contrast to the facts as characterized in *Hibi*, these respondents have consistently argued that the majority's view of the 1945 events as neglect does not represent a full and fair description of what really happened. As fully documented in the record, the Attorney General's decision in 1945 to stop naturalizing any more veterans in the Philippines was far from neglect. It was instead a deliberate, unambiguous decision to prevent operation of the law by making naturalization impossible for the very people that the Attorney General himself had acknowledged to be among the law's intended beneficiaries. Consequently, when the court below ordered the naturalization of these respondents because of the Attorney General's violation of his statutory duty, it could do so correctly because *Hibi* did not consider a remedy for a conscious decision to avoid enforcement of the law as distinguished from a mere neglect of duty.

This characterization of the facts is significant for another reason. *INS v. Hibi* was a *per curiam* opinion summarily reversing the courts below. As such, it was made without the benefit of briefs or oral argument. In a sense, this brief of respondents is the brief the Court never saw in *Hibi*. Therefore, respondents urge the Court to reassess its characterization of the facts as described in *Hibi* to reach the conclusion that, on the record, the Attorney General acted deliberately in violation of his mandate under the 1940 Act, and that his conduct does compel the naturalization of these respondents despite the expiration of the 1940 Act.

2. In light of the Attorney General's error in 1945, subsequent amendments to our naturalization laws terminating the right of veterans to be naturalized under the 1940 Act (i.e., § 310(e) of the current Immigration & Nationality Act, 8 U.S.C. 1421(e); § 329(d) of the Act, 8 U.S.C. 1440(d), or § 2 of the Act of June 1, 1948, ch. 360, 62 Stat. 283) do not deprive the courts of the authority to order the naturalization of these respondents. Of course, such a suggestion would have no weight in a constitutional context, for no law can be used to frustrate the remedy for a violation of due process. *See, e.g., Olegario v. United States*, 629 F. 2d 204, 220 (2d Cir. 1980), *cert. denied*, 450 U.S. 980 (1981) (§ 310(e) "cannot negate the due process rights of a petitioner who alleges that he was unconstitutionally denied the opportunity to apply for a benefit decreed by Congress."). Nor should any such amendments foreclose naturalization for a statutory violation, because there is no evidence that Congress enacted any of them with the knowledge that veterans like these respondents had been deprived of their right to apply for naturalization by conduct which contravened the Congress' earlier mandate. Thus, even though Congress may have meant to narrow naturalization opportunities by means of postwar legislation, there is no indication that the legislation was meant to be anything but prospective in operation or that it was intended to add injury upon injury to these veterans or to perpetuate the injustice created by the Attorney General's unilateral conduct in 1945.

The legislative history of § 310(e) shows only that the section was enacted to prevent certain lawful permanent residents of the United States from choosing to apply for naturalization under either the 1940 Nationality Act or the 1952 Act, whichever was more favorable to them. The possibility of such a choice had been provided by the sav-

ings clause of the 1952 Act and judicial interpretations of it. Congress felt that the election was unfair to persons who could only be naturalized under the more stringent provisions of the present 1952 Act. It also felt that it was cumbersome to administer two naturalization laws at the same time. *See* 1961 *U.S. Code Cong. & Admin. News* at 2981-82. *See also, e.g., United States v. Menasche,* 348 U.S. 528 (1955). The result of § 310(e) was to require lawful permanent residents who could previously choose between the 1940 and 1952 Acts to apply only under the 1952 Act.

The respondents, in short, are not within the scope of § 310(e). They are not lawful permanent residents of the United States. Thus, if they lose their suit now, they will not be able to apply for naturalization under the 1952 Act, as were the persons who could no longer choose naturalization under the 1940 Act. Naturalization proceedings for the respondents now will not entail the continuing administration of an expired law because the numbers of veterans are necessarily limited by time if nothing else. The naturalization of the respondents will be unfair to no other person imaginable.

THE EQUITABLE REMEDY GRANTED BY THE COURT BELOW WAS PROPER IN VIEW OF THE ATTORNEY GENERAL'S CONDUCT IN 1945

The INS argues that even if the court below was correct in ruling that the Attorney General violated the statute by withholding the opportnuity for respondents to petition for naturalization under the 1940 Act, the court lacked the authority to grant an equitable remedy. The INS contends that the traditional equity power of the courts is barred by the present naturalization statutes.

In exercising their broad equitable power, federal courts may "use any available remedy to make good the wrong done," *Bell v. Hood,* 327 U.S. 678, 684 (1946). They may not be deprived of these powers except by the clear mandate of Congress.

> Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.

Porter v. Warner Co., 328 U.S. 395, 398 (1946).

Although current naturalization provisions prohibit the consideration of a naturalization petition under former statutes, it is by no means clear that Congress intended to perpetuate the wrong done to Filipino veterans who were intentionally prevented from applying under a former law. No such intent is clear because, as already noted, there is no evidence that Congress knew about the wrong done to such veterans when it enacted such legislation.

The government argues further that courts have no equitable jurisdiction in naturalization proceedings. This argument is based on a series of cases in which the Supreme Court held that the courts could not grant a legal claim to citizenship to those who did not qualify under the statute. *See Fedorenko v. United States,* 449 U.S. 490, 517 (1981); *United States v. Ness,* 245 U.S. 319, 324 (1917); *United States v. Ginsberg,* 243 U.S. 472, 474 (1917). As a careful reading of these cases demonstrates, their holdings are limited to the principle that naturalization under the statutory provision is not a discretionary right. Without a justification explaining why they were excused from the statutory requirements, the

parties did not show that they had a legal right to citizenship. They were therefore entitled to neither a legal nor an equitable remedy. In contrast, the respondents here did establish a violation of their legal (i.e. statutory) right to petition for naturalization under the 1940 Act.

Moreover, there is a difference between a case, such as *Fedorenko,* in which the issue is a person's eligibility for naturalization, and a case such as this where governmental conduct plainly foreclosed a determination of eligibility from being made altogether. Finally, as is evident from this Court's conclusion in *Hibi* that the government might be equitably estopped in appropriate circumstances, the federal courts retain their full equitable powers in naturalization matters. Thus, far from frustrating congressional intent, exercise of equitable powers by the court below actually gave effect to the intent of Congress to reward World War II veterans with the opportunity to apply for American citizenship.

In devising a remedy, equitable considerations weigh heavily in favor of granting the respondents the right to the processing and adjudication of their petitions for naturalization. Although it appears that such a remedy overlooks prohibitions in subsequent legislation, such as § 310(e) and § 329(d) of the Immigration & Nationality Act of 1952, 8 U.S.C. §§ 1421(e) and 1440(d), it has been demonstrated earlier that these statutes, as well as the 1946 Act and the 1948 Act, do not reflect on Congress' intention in the 1940 Act, are not a ratification of the Attorney General's conduct in 1945-46, and were not intended to cut off rights to petition for naturalization in the period before December 31, 1946. Thus, the remedy fashioned by the court below gives effect to Congress' purpose under

the 1940 Act. Moreover, as respondents have also pointed out, the proposition that the Attorney General might have meant to give effect to foreign policy concerns in 1945-46, does not result in a conclusion that he was free to disregard Congress' purposes in legislation that he had been directed to execute and that had been enacted under Congress' naturalization authority.

The Attorney General's conduct in 1945 directly injured the respondents. Even if they or veterans like them had known of the opportunities in the 1940 Act or even if they can be charged with constructive knowledge of the opportunities, they were deprived of the means necessary from them to act on the knowledge. Thus, their injury does not depend on their knowledge because their knowledge was irrelevant to the availability of the benefits of the 1940 Act.[5]

The fact that a special naturalization examiner was working in the Philippines for two months in 1945 does not indicate that the respondents did not suffer in injury. *See* Brief for Petitioner at 48. This argument of the government obscures that fact that there was no special examiner in the Philippines during the subsequent nine months. The government is charging the respondents with a failure to petition for naturalization in the two

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[5] In any event, a naturalization court can inquire of each applicant under the 1940 Act whether he knew of opportunities under the Act in 1945-46 and whether he would have applied in 1945-46 if he had the knowledge. This is the procedure that the Immigration Service devised for veterans who filed petitions for naturalization before the withdrawal of the government's appeal in *In re Naturalization of 68 Filipino War Veterans,* 406 F. Supp. 931 (N.D. Cal. 1975), and who have since been naturalized.

month period. However, the veterans would have had the opportunity to do so for more than two months but for the Attorney General's withdrawal of the examiner. The government's argument is speculative because in effect it is charging the respondents and others like him with a failure to apply in 1945 on the theory that they should have had foreknowledge that the special examiner would be withdrawn!

It is not relevant that other noncitizens elsewhere may have had less of an opportunity to be naturalized overseas during the war. Contrary to these Filipinos, the others who missed out on the overseas naturalizations suffered no comparable loss. To begin with, they were presumably given notice of their opportunity to apply, as required by War Department Circular 382. Brief for the Petitioner at 47. Moreover, they could always apply for naturalization under § 701 or the ordinary provisions for naturalization once they returned to their homes in the United States. But there was no practical way for Filipino residents of the Philippines, like these respondents, to come to the United States for naturalization, at least in any significant numbers. § 702 offered them their one and only opportunity.

The burden of adjudicating the veterans' petitions is not great. As has been noted previously, the veterans are necessarily a diminishing group. Whether many of them would choose to apply for naturalization at this late date is speculative. Even if they did so, however, the Immigration & Naturalization Service and the United States District Courts are capable of making credibility determinations on the issue of the existence of military service or the knowledge of the opportunity to naturalize in 1945-46.

Such determinations are the day-to-day business of both the Service and the courts in numerous other areas and situations.

The management of any "spillover" effect on the United States immigration system is not difficult. Natives of the Philippines currently and for many years past have utilized all of the 20,000 immigrant visas annually available to the Philippines under the Immigration & Nationality Act of 1952. As a result, quota waiting periods have become several years long. *See, e.g.*, U.S. Dept. of State, Bureau of Consular Affairs Visa Office Immigrant Numbers for January 1988, indicating serious oversubscription of the Philippines quota. Thus, there will be no immediate and large influx of the veterans' adult children and their dependents. Indeed, so long are the quota waiting periods that it is realistic that, in many cases, naturalized war veterans who have petitioned for adult children will die before the children's immigration becomes possible. As a result the pending immigration petitions will be automatically revoked. The foregoing discussion does not include the surviving wives of war veterans or their minor children as these persons can immigrate outside the quota system. However, the number of such persons is unknown and it is unlikely that there are very many minor children at this late date. Last, the government's argument from numbers is at bottom unpersuasive because, if the veterans had been naturalized in 1945-46, their wives would have been living in the United States for the past 40 years and all their dependents would have been born in the United States and not relegated to the disadvantages of the quota system.

THE FIFTH AMENDMENT GUARANTEE OF DUE PROCESS REQUIRES THE PROCESSING AND ADJUDICATION OF THE RESPONDENTS' PETITIONS FOR NATURALIZATION

1. The respondents have been deprived of a property interest.

The respondents have consistently argued that the conduct of the Attorney General in 1945 deprived them of a right to petition for naturalization which was created by the 1940 Act and which is protected by the due process clause of the fifth amendment.[6] The court below did not address this issue because it believed that its analysis of the case provided a solution that did not need to rest on a constitutional ruling.[7] In this, the court hoped to follow the general rule that unnecessary constitutional adjudication should be avoided. 796 F. 2d at 1101. *See Jean v. Nelson*, 472 U.S. 846 (1985), and cases cited therein. However, if this Court finds that the court below granted

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[6] As residents of a U. S. territory and as nationals owing allegiance to the United States wher. the events of this case took place, if not by reason of their service in U. S. military forces, respondents were protected by the Due Process Clause of the Fifth Amendment to the U. S. Constitution. *See e.g. Olegario v. U.S.*, 629 F. 2d at 222 and cases cited there.

[7] The court below stated that the respondents based their constitutional claim on the equal protection component of the fifth amendment's due process clause. 796 F. 2d 1095. However, the briefs in the court below show that the respondents raised the additional due process argument that the Attorney General had deprived them of a property interest. *See, e.g., Brief of Petitioners-Appellants pursuant to Court's Order of January 25, 1985*, at 1-3; *Supplemental Brief for the Respondent-Appellee* (dated Feb. 22, 1985), at 4-10. The fact that the court below did not mention this claim in its opinion is irrelevant because the court's decision did not reach any constitutional issue.

an inappropriate equitable remedy because of the violation of the statutory right to petition for naturalization, this Court can proceed to the respondent's constitutional claim and the possible remedies thereunder. *See Commodity Futures Trading Commission v. Schor*, — U.S. —, 106 S.Ct. 3245 (1986) (Finding that non-constitutional analysis of the court below was incorrect, this Court proceeds to decide the constitutional issue avoided by the court below.) This review now would be appropriate as the constitutional issue was raised below and there have been no intervening developments that might change the record legally or factually. Thus, the constitutional issue here is a purely legal issue based on a fixed record.[8]

In addressing this constitutional issue, the Court is faced with a two-part inquiry: were the respondents deprived of an interest protected by the due process clause and, if so, what process was their due. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982). As to the first part of the inquiry, this Court has never directly ruled on the issue of whether the opportunity for a benefit offered by the government is a liberty or property interest within the scope of the due process clause. *See Lyng v. Payne*, — U. S. —, 106 S.Ct. 2333, 2343 (1986); *Walters v. National Assn. of Radiation Survivors*, — U.S. —, 105 S.Ct. 3180, 3189 n. 8 (1985). Such a right, however, is demonstrable in the context of this case.

This Court has recognized that a property or liberty interest can have its origin in a statute or other positive

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[8] An alternate method of decision would be to remand the constitutional issues to the court below so that it can decide them in the first instance.

rule of law. *See, e.g., Goss v. Lopez*, 419 U.S. 565, 572-73 (1975) (State law created right to education); *Bishop v. Wood*, 426 U.S. 341, 344 (1976) (no right to continue employment as a policeman); *Logan v. Zimmerman Brush Co.*, 455 U.S. at 430-31, (right to use state adjudicatory procedures to determine employment discrimination). Such interests are "varied and, as often as not, intangible, relating 'to the whole domain of social and economic fact.'" *Logan v. Zimmerman Brush Co., ibid., quoting National Mutual Insurance Co. v. Tidewater*, 337 U.S. 582, 646 (1949) (Frankfurter, J., dissenting). Their common characteristic is that they are entitlements that cannot be taken away except for cause. *Logan v. Zimmerman Brush Co., ibid.*

The 1940 Act created such an entitlement for the respondents. As discussed above, the language and history of the Act show that Congress intended to extend the opportunity of United States citizenship to noncitizens who would serve in the United States Armed Forces and who had resided in a State or Territory. Thus, it was within the contemplation of Congress that Filipino noncitizen nationals of the United States have the opportunity, at least until postwar considerations prompted a change of congressional intent. Congress provided the opportunity in the exercise of its exclusive constitutional power to provide for a uniform rule of naturalization. U.S. Const. Art. I, § 2, Cl. 4. This power was to prevail in United States territory over which Congress had constitutional authority. U.S. Const. Art. IV, § 3, Cl. 2. The opportunity was not a one-sided act of generosity as was the statutory grant of a right to public education discussed in *Goss v. Lopez* or like other property interests discussed

in the cases cited in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430-31. Rather, it was an opportunity that was granted in *exchange* for a service to the United States. In such a context, the individual serviceman could legitimately expect that the opportunity to petition for naturalization would be available to him if he desired to avail himself of it.

The fact that naturalization is not guaranteed to the person who petitions for it does not mean that the opportunity to petition is not a property interest. Although Congress need not enact any naturalization law and even though such a law could presumably take a form that did not require a petition, the 1940 Act made the petition a prerequisite to the process of naturalization. Thus, without the opportunity to petition, naturalization could never occur despite the serviceman's eligibility to be naturalized. Similarly, the petitioner in *Logan v. Zimmerman Brush Co.*, who was found to have a property interest in availing himself of an adjudicatory procedure, was not assured of prevailing on his discrimination claim. However, he was found to be entitled at least to avail himself of the procedure so that he might try to advance his claim and seek to redress the alleged discrimination. The respondents are in as good a position as the petitioner in *Logan*. The respondents' opportunity to be naturalized is at least on a level with the right to redress discrimination for, in a practical sense, this right and other enunciated rights hinge on the respondents' nationality status.

Naturalization itself is not a constitutional right. However, at least two courts have found that a right to apply for a benefit is a due process right even though

there is not a constitutional right to the benefit itself. *See Haitian Refugee Center v. Smith*, 676 F. 2d 1023, 1038-39 (5th Cir., Unit B, 1982); *Orantes-Hernandez v. Smith*, 541 F. Supp. 351 (C.D. Cal 1982). In *Haitian Refugee Center*, the court held that the right to apply for political asylum is within the scope of the due process clause even though the grant of asylum is discretionary. In *Jean v. Nelson*, 727 F. 2d 957, 981 (11th Cir. 1984) (en banc), *affirmed on other grounds*, — U.S. —, 105 S.Ct. 2992 (1985), the same circuit seemed to conclude that the right to apply for asylum was not a due process right because the discretionary nature of the grant of asylum meant that asylum was not an entitlement. [9]. However, it is difficult to conceive of an applicant's obtaining asylum status if he is deprived of the given right to apply for it. In this respect, the Eleventh Circuit's reasoning conflicts with *Logan v. Zimmerman Brush Co.* because it is difficult to conceive of the *Logan* petitioner's redressing the discrimination against him without availing himself of the adjudicatory procedures in question in the case.

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[9] The grant of naturalization under the 1940 Act and under § 310-48 of the present Immigration & Nationality Act, 8 U.S.C. § 1421-58, is not discretionary as is the grant of asylum under § 208 of the Immigration & Nationality Act, 8 U.S.C. § 1158. The determination whether a person should be naturalized is substantially different from the determination whether to grant asylum. Under the 1940 Act and today, naturalization is a question of eligibility: if the petitioner is factually eligible for naturalization, he must be naturalized. In contrast, the Attorney General can deny asylum in the exercise of his discretion even though the applicant may be a refugee as defined in § 101(a)(42) of the Immigration & Nationality Act, 8 U.S.C. § 1101(a)(42). Thus, arguably, the result of naturalization follows more directly from the opportunity to apply than is the case with a grant of asylum.

The same defect in reasoning applies to the Second Circuit's analysis of the opportunity of Filipino World War II veterans, like the respondents here, to apply for naturalization under the 1940 Act. *Olegario v. United States*, 629 F. 2d 204, 223-24 (2nd Cir. 1980), *cert. denied*, 450 U.S. 980 (1981). Ultimately, both the Eleventh Circuit in *Jean v. Nelson* and the *Olegario* court confuse the result of a given procedure with the opportunity to utilize the procedure so as to obtain any result.[10]

In answer to the second part of the due process inquiry, the process that is due to the respondents for the deprivation of their opportunity to petition for naturalization is the present day processing and adjudication of their petitions. It is the only remedy that can redress the deprivation in question. It is simply the hearing that due process requires. The appropriateness of the remedy is demonstrated by the application of the analysis laid out in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), which seeks to accommodate the competing interests of the government and the individual. The interests to be examined include the importance of the private interest; the length or finality of the deprivation; the likelihood of government error; and the governmental interests, including fiscal and administrative burdens.

In this case, each of these factors points to the remedy that the respondents are seeking. Their interest in the

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[10] The citations in *Jean v. Nelson* to *Hewitt v. Helms*, 459 U.S. 460, 103 S.Ct. 864 (1983), and to *Bishop v. Wood*, 426 U.S. 341, 96 S.Ct. 2074 (1976), are also inapposite. 727 F. 2d at 981. In neither of the cases did the existence or not of a protected interest turn on the "existence of certain procedural guidelines" that had to be followed in arriving at a decision. In fact, in *Hewitt v. Helms*, a liberty interest was found in light of state law.

opportunity to be naturalized is obviously an important interest as the privileges and rights that citizenship brings are precious. Moreover, respondents have already taken on one of the burdens of citizenship, service to the United States through service in the armed forces. The deprivation of this opportunity is permanent, as the purpose of the Attorney General's conduct in 1945 was to make it a permanent deprivation. Government error in the present circumstance is, in fact, absolute for it would permit no meritorious claim of citizenship under the 1940 Act to be adjudicated. The burden on the government is small. This case concerns 16 respondents and the class of veterans like them is diminishing through attrition.

There will be no disruptive effect on normal immigration procedures. There is nothing particularly difficult about adjudicating the veterans claims now: most of them can demonstrate their good moral character and their World War II service can be verified through the United States Army Record Center, or by secondary evidence for those whose records may have been destroyed in the fire at the Record Center. Further, there is nothing unusual about the Immigration Service's having to probe the credibility of a veteran's claim that he would have applied for naturalization in 1945-46 had he known of the opportunity. Most of the Immigration Service's important adjudications involve credibility findings. Last, the administration's foreign policy with respect to the Philippines was completely fulfilled in 1945-46, and, realistically, this case and the cases of other veterans are important only to the veterans themselves.

2. Respondents have been deprived of the equal protection of the laws.

Respondents have also argued that they and the veterans like them have been deprived of the equal protection of the laws because the conduct of the Attorney General in 1945 was a deliberate and successful attempt to prevent only Filipino veterans from petitioning for naturalization under the 1940 Act. This equal protection claim has been a theme throughout the cases that have dealt with the circumstances of veterans like the respondents. *See Olegario v. United States* and *In re Naturalization of 68 Filipino War Veterans*, 406 F. Supp. 931 (N.D. Cal. 1975), *appeal withdrawn*, No. 76-1832 (9th Cir., Nov. 11, 1977).

The premise of the respondents' argument is that, even if the Attorney General did have the authority to appoint or withdraw special naturalization examiners, he could not exercise the authority in a discriminatory manner without justification. There is little guidance on how to weigh or analyze the reasons the federal government must advance in order to justify a discrimination against persons based on national origin. *See Olegario v. United States*, 676 F. 2d at 230 ("it is easier . . . to state what the standard is not than to define precisely what it is."). However, at least it must be determined whether there was a legitimate basis for presuming that the discrimination was intended to serve an overriding national interest. *See Hampton v. Mow Sun Wong*, 426 U.S. 88, 103 (1976). The respondents claim that the discrimination did not serve any such interest. The government has stated that the discrimination was a legitimate response to the concerns

of the nascent Philippine government that the naturalization of veterans would deprive the Philippines of needed manpower. However, the record in the court below makes this assertion speculative. *See* documents comprising Docket Entry No. 17. Among these documents is the memorandum dated October 29, 1945, of Paul M. McNutt, United States High Commissioner of the Philippine Islands, stating:

> We are assured by the President of the Philippine Commonwealth that neither he nor his government have taken any official attitude upon his subject.

The High Commissioner made this statement in response to the request of Edward Shaughnessy, Special Assistant to the Commissioner of the INS, to identify exactly what representatives of the Philippines had expressd the attitude of the Philippine government regarding the naturalization of the veterans. *See* memorandum of October 19, 1945, to Paul M. McNutt from Edward J. Shaughnessy. Later, Mr. Shaughnessy passed on his correspondence with the High Commissioner to the Commissioner of the INS with the comment that the High Commissioner's response takes issue with the off-the-record statement that Filipino officials were opposed to the naturalization of Filipinos. *See* Memorandum of Nov. 9, 1945, to Ugo Carusi from Edw. J. Shaughnessy. At the least, the correspondence in question shows the disarray that prevailed in the office of the Attorney General at or about the time the Attorney General ordered the withdrawal of authority from the special naturalization examiner. This material together with the other material of record also mentioned in *Olegario v. United States*, 629 F. 2d 231-32, makes clear

that the official view that there were objections of the Philippine government was speculative and poorly documented. In sum, the respondents maintain that the Attorney General's conduct in 1945 was concerned mainly with the expected influx of Filipinos into the United States and not with concerns for the postwar health of the new Republic of the Philippines.

CONCLUSION

For all of the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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January 22, 1988

RESPONDENT'S

BRIEF

Supreme Court, U.S.
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Nos. 86-1992 and 86-2019

In The
Supreme Court of the United States
October Term, 1987

IMMIGRATION AND NATURALIZATION SERVICE,
Petitioner,

v.

ANTOLIN PUNSALAN PANGILINAN, et al.

IMMIGRATION AND NATURALIZATION SERVICE,
Petitioner,

v.

BONIFACIO LORENZANA MANZANO

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

The question presented, as described by the petitioner, does not include an issue which applies to this individual respondent. In this case, therefore, the question is: Whether this individual respondent is entitled to be naturalized in view of the petitioner's complete failure of proof below.

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Nos. 86-1992 and 86-2019

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IMMIGRATION AND NATURALIZATION SERVICE,
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v.
BONIFACIO LORENZANA MANZANO

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT MANZANO

STATEMENT

Contrary to the assertion of the Immigration and Naturalization Service (INS) in its original petition, Petition for a Writ of Certiorari to the Court of Appeals for the Ninth Circuit (hereafter, *Manzano* Pet. Cert.) at 6, and the general impression given by its opening brief, the

issues in *Manzano* are not completely identical to those involved in *INS v. Pangilinan*, No. 86-1992.

There are some similarities, however. Manzano served honorably in the United States military forces in World War II, and, during the period of his active military service, he took no steps to apply for naturalization under the special wartime legislation. Thus, in this respect, he can be considered a "Category II" veteran.[1] However, at trial, the INS produced no evidence whatsoever in support of its assertions and did not, therefore, prove up its case. In this respect, Manzano's case differs slightly from that of most of the respondents in No. 86-1992.

SUMMARY OF ARGUMENT

Although Manzano shares certain aspects in common with the *Pangilinan* respondents, No. 86-1992, his case is basically different from the case of those veterans in that the INS submitted no evidence whatsoever at trial to support its contentions in his case. Thus, while there was no argument on the fact that INS withdrawal of the naturalization examiner was peculiar to the Philippines, the INS produced no evidence to justify its discriminatory treatment of Filipinos. While the *Pangilinan* respondents stipulated on the evidence, Manzano was not a party to their agreement. The INS' attempts to use evidence from cases to which Manzano was *not* a party should not be allowed. If the INS chooses, for whatever reasons, not to submit the evidence in its possession, it should suffer the consequences and lose its case for failure of proof.

As to the issue of statutory construction, Manzano, through counsel, has conferred with counsel in *Pangilinan*, and he joins the arguments set out in their brief to be filed with the Court.

[1] The INS, the courts and the respondent in this litigation have used a shorthand method of describing Filipino veterans of World War II. This method uses the term "Category I" veteran and "Category II" veteran. Deriving from the system set up in *In re Naturalization of 68 Filipino War Veterans*, 406 F. Supp. 931 (N.D. Cal. 1975), (hereafter *68 Veterans*), "Category I" refers to eligible veterans who tried to apply for naturalization before the expiration of the special wartime legislation on December 31, 1946. "Category II" refers to otherwise eligible veterans who took no steps while on active duty to try to apply for naturalization during that period. The INS considers veterans, like Manzano, who tried to apply during the period but after their discharge from military service to be in Category II.

ARGUMENT

PETITIONER'S CASE FALLS FOR FAILURE OF PROOF

Immigration and Naturalization Service (INS) policies have forced Filipino World War II veterans to bring individual lawsuits. Since the Filipino veterans must fight their cases individually, the INS must respond in each individual case with appropriate evidence to establish its arguments. Where there is no evidence submitted, the INS must lose for its failure of proof.

A. The Problem: INS, Not Congress Or The Judiciary, Actually Decides Who Should Be Naturalized

INS Policy Forces Veterans To Litigate Individual Cases

One of the most variable factors in the Filipino veterans litigation over the years has been the attitude of the

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INS. Naturalization is a matter entrusted in the first instance to the Congress. *Constitution*, Article I, Sec. 8, Cl. 4. That body has assigned to the courts the task of actually naturalizing the applicants. 8 U.S.C. 1421(a). Thus, the INS has no direct function to play. Its role is more akin to that of an investigator who assists the courts to perform their statutory role. 3 Gordon and Rosenfield, *Immigration Law and Procedure* 14.7a (1986). Yet the INS policy of the moment seems to be the major factor in the outcome of these cases.

However, the INS has had no consistent policy regarding Filipino veterans in the 42 years since the end of World War II. After the wartime naturalization statute was passed, the INS at some point allegedly decided that Filipino veterans were eligible to naturalize, and it made naturalization procedures available to them in approximately August of 1945. Brief for the Petitioner (hereafter Br.Pet.) at 7. This was a full ten months after the return of American forces to the Philippines and some five months after the capture of Manila and the liberation of the islands. 19 *Encyclopedia Britannica* 1009 (1975). However, about one month later, the INS decided to prevent such naturalizations under the wartime statute (Br. Pet. at 8). Later, the INS apparently decided that, in the naturalization proceedings of those few veterans who *were* able to file petitions based upon their military service, Philippine Commonwealth Army (PCA) service would not confer any benefits (*Id.*, at 9). This policy seems to have lasted until 1957 when, once again, the INS changed its mind and decided that PCA veterans could be naturalized. (*Id.*, n.12) From 1947 until 1977, the INS opposed

the efforts of all Filipino veterans to be naturalized under the expired wartime statute. Then, suddenly, the INS changed its mind again and decided that the veterans could be naturalized. This event occurred in November of 1977 when the INS withdrew its appeal in the *68 Veterans* case. Thereafter, in 1978, the INS once more changed its mind and decided that only some veterans (Category I and the "grandfather" cases) could be naturalized, and others (Category II cases filed after 1977) could not be naturalized (Br.Pet. at 10-11, notes 14, 15).

The INS' contradictory policies, especially the withdrawal of the appeal in the *68 Veterans* case, followed by a reevaluation of policy as to Category II veterans, has resulted in numerous individual actions being pursued in the courts. Thus, Mr. Manzano was forced by the INS' policy to bring an individual action on his naturalization petition.

Why should the INS exercise what has been, in effect, the sole power to determine who should and who should not be naturalized when the Congress passed a statute which was clear in its meaning? One might speculate that, in ten or twenty years, when these and other veterans are well into their 70's and 80's and 90's, and when there are, therefore, fewer veterans, the INS could change its mind again and decide that Category II veterans such as Mr. Manzano could be naturalized. If past history is any guide, we may reasonably expect such an event to occur in the future. If it could occur in ten or twenty years, why not now?

REPLY

BRIEF

No. 86-1992

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In The

Supreme Court of the United States

October Term, 1986

IMMIGRATION & NATURALIZATION SERVICE,
Petitioner,

v.

ANTOLIN PUNSALAN PANGILINAN, *et al.*,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

The question presented, as described by petitioner, is not a fair statement. The question is not whether Filipino veterans of World War II, whose opportunity to apply for American citizenship under greatly liberalized conditions expired in December, 1946, are nonetheless currently entitled to citizenship because no designated examiner was stationed in the Philippines to naturalize them under that law between October 1945 and August, 1946. Instead, the question is whether they remain eligible under that law because the Attorney General of the United States deliberately and intentionally revoked the authority of the naturalization representative to naturalize anyone in the Philippines during that period for the avowed purpose of preventing qualified Filipino veterans, like respondents, from applying for naturalization.

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STATEMENT

This case is about an aging and dwindling group of Filipino veterans of World War II, men who are now in their sixties and seventies, who served honorably in the armed forces of the United States in the Philippines during the war and who were promised the opportunity to become American citizens in return for their military service.

The promise was made to them by Congress in March, 1942, when it enacted a law authorizing the expeditious naturalization of certain non-citizens who would serve on active duty in American forces during the war. Ironically, the law was passed at the very moment that Filipino soldiers like these respondents were being honored as heroes by the American people for their valiant defense of Bataan and Corregidor in the dark, early days of the war.

This case is also about how the Attorney General of the United States broke that promise just as the war had ended, when, in the privacy of his office and with the stroke of a pen, he approved a plan that would make it impossible for respondents and other veterans in the Philippines to accept the offer of citizenship that Congress had made them.

The story of how all this happened begins with the enactment on March 28, 1942 of the Second War Powers Act, 56 Stat. 182. As a part of that Act, Congress added several provisions to the Nationality Act of 1940 which were designated as §§ 701 through 705 of the 1940 Act.

Section 701 exempted qualified servicemen and women from the usual naturalization requirements, including a period of residence in the United States. Section 702 provided for their naturalization overseas, beyond the juris-

diction of naturalization courts where immigrants ordinarily apply for citizenship. And § 705 directed the Commissioner to "carry into effect" the provisions of the law.[1]

For Filipinos, such as these respondents, who had never lived in the United States, § 702's provision for overseas naturalization was of critical importance. Other non-citizen servicemen, who had enlisted or were inducted while living in the United States, could expect to return after the war and qualify for naturalization either under § 701 or under the standard provisions. But there was no practical way for Filipinos who had joined the American forces in the Philippines to reach America unless they were first naturalized overseas because there was no place for any but a few under then existing immigration quotas.

To make sure that qualified servicemen serving overseas would have a chance to apply, § 702 called for designation by the Commissioner of Immigration of representatives to travel to the various theaters of war and to naturalize those servicemen wishing to apply. Acting in accordance with the foregoing directives, the Commissioner of Immigration promptly appointed representatives who went overseas to naturalize applicants on active duty there. Thousands of qualified servicemen were naturalized in all parts of the world and soon after the Philippines liberation, a representative was designated by the Commissioner to naturalize qualified servicemen in the Philippines as well. The representative, an American

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1 Sections 703 and 704 were housekeeping provisions and are not relevant to the issues raised here.

vice-consul in Manila, started to naturalize qualified servicemen in August, 1945. But no sooner had he begun when his authority was revoked by the Commissioner, with the express consent of the Attorney General of the United States.

The record in the proceedings below establishes that the Commissioner's action was prompted by a concern that too many Filipinos might take advantage of the naturalization law to leave the Philippines for the United States. Word had been relayed to the Commissioner from American diplomats in Manila reflecting the concern of certain anonymous Philippine officials that large numbers of Filipinos who were then eligible for naturalization might, if they became American citizens, leave the islands on the eve of Philippine independence. The events leading to that decision were summarized in a memorandum prepared by the Commissioner for the Attorney General, dated September 13, 1945, which concluded with the following suggestion:

> "The Philippine Government again has expressed to the Department of State its concern because Filipino members of the Armed Forces of the United States are being naturalized even though they have always been domiciled in the Philippine Islands. Since the islands are not embraced within the domain of any naturalization court, naturalization therein may be awarded only by an administrative official designated by me under the authorization of § 702 of the Nationality Act, 8 U.S.C. 1002. Mr. George Ennis, Vice Consul of the United States in Manila, has been designated to grant naturalization under § 702, but I do not believe he has yet exercised his authority.
>
> "In view of the concern expressed by the Philippine Government, it is my belief that the situation might

best be handled by revoking the authority previously granted to Mr. Ennis and by omitting to designate any representative authorized to confer citizenship in the Philippine Islands. This would eliminate a source of possible embarassment in our dealings with the Philippine people, who probably will be awarded independence in the near future."

The Commissioner's suggestion was approved by the Attorney General on September 26, 1945. And while American army and naval officers requested the designation of another representative for the Philippines thereafter, none was sent until August of 1946, almost a full year later. But that was after Philippine independence on July 4, 1946 and by that time, these respondents and most other veterans had been discharged from the service, and thus were no longer eligible to apply for naturalization under § 702.

They were no longer eligible because the benefits of § 702 were available to servicemen only while they were on active duty. Once discharged, their eligibility was lost. Therefore, when a new naturalization examiner returned to the Philippines late in 1946, his presence was of no consequence to these respondents who, by that time, had already left the armed forces. Only those who had been fortunate enough to re-enlist in certain army units which continued to be a part of the U.S. Army after Philippine independence were naturalized in October and November of 1946.

Obviously, as the Commissioner of Immigration himself wrote, no one could be naturalized in the Philippines if he, the Commissioner, refrained from sending a naturalization examiner there. By doing precisely that while these

veterans were being discharged from the service, the Commissioner was able to keep qualified Filipino war veterans, including respondents, from exercising their right to apply for American citizenship in exchange for the heroic service they gave to the United States during the war.

Now, some four decades later, the court of appeals has held that the action of the Attorney General exceeded his authority and thwarted the will of Congress. It has awarded respondents the American citizenship they should have had and enjoyed all those years.

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REASONS FOR DENYING THE PETITION

There is no good reason for this Court to disturb the ruling of the court below.

This case involves a discrete group of war veterans whose number is getting smaller through the passage of time. Allowing the court of appeals decision to stand will not affect a large number of persons, particularly when compared to the millions of illegal aliens who have been invited to apply for legal resident status under legislation sponsored by this very same administration.

In addition, this case presents no issue of significant or lasting public interest. To be sure, the tension between the Executive and Legislative Branches which is involved here is an interesting issue. But it is an academic one because the historical facts which gave rise to the issue here are so peculiar as never to happen again. Consequently, the court of appeals' opinion will be precedent for nothing more than the cases of other Filipino veterans like respondents.

The decision of the court of appeals is not in conflict with other cases decided by this court; in particular, it is not in conflict with *INS v. Hibi*, 414 U.S. 5 (1973), because the constitutional and statutory issues present here were neither raised nor decided by this court in *Hibi*.

Finally, the court of appeals decided correctly that the Attorney General acted in excess of his authority when he halted further naturalizations in the Philippines in 1945. The court also had the authority to provide the only adequate remedy, the prompt naturalization of each respondent.

The Decision Below Will Not Affect a Large Number of Persons and Will Have No Significant or Lasting Public Interest

The Immigration and Naturalization Service (INS) would like this Court to believe that the Ninth Circuit's decision will open the doors of this country to untold thousands of new immigrants. To bolster this statement, the INS provides the alleged numbers of naturalization petitions that the veterans have filed. Petition for Certiorari at 15 n.22. Only two comments about these figures are appropriate. First, they are not a matter of record in any of these various cases that concern the naturalization of war veterans. Where the INS obtained the figures is unknown. Whether the figures are correct is also unknown. What the specific issues are in each case is unknown. The Court should therefore ignore the figures. Second, even if the Court takes the figures at face value, they are hardly astounding. The naturalization of a few thousand veterans and the eventual immigration of some of their dependents will have only a small impact on immi-

gration from the Philippines, a country that consistently uses all of the 20,000 visas that are its annual allotment under our immigration quota system. Section 202(a) of the Immigration and Nationality Act, 8 U.S.C. § 1152(a). *See, e.g.*, U.S. Department of State, Bureau of Consular Affairs, Visa Office Immigrant Numbers for August 1987, indicating serious over-subscription in the Philippine quota.

Far more telling than the numbers that the petitioner trots out is the fact that the veterans are an aging and necessarily diminishing group. This statement includes, of course, both the veterans who have applied for naturalization and the veterans who have not and are outside the United States. Although we have not done a study, common sense tells us that the veterans who were active combatants or prisoners of war between 1942 and 1945 are at least in their sixties and older. This is a group that becomes smaller and smaller because of ill-health, disability, and death. Common sense also says that it is a settled group with many members who are unwilling now to relocate in this country.

There is also no great "spillover effect" from the naturalization of veterans. Petition for Certiorari at 15. Those who do naturalize and relocate in the United States will undoubtedly sponsor the immigration of their wives as "immediate relatives" outside the quota system. Section 201(b) of the Immigration and Nationality Act, 8 U.S.C. § 1151(b). But it is unlikely, because of their ages, that they now have many minor children who could also immigrate outside the quota system. *Ibid.* If they have unmarried adult children, they can sponsor the children's

immigration under the first preference quota category. Section 203(a)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1153(a)(1). But the waiting period for a first preference immigrant visa from the Philippines is at least six years. *See*, U.S. Department of State, Bureau of Consular Affairs, Visa Office Immigrant Numbers for August 1987. Married adult children could immigrate under the "fourth preference." *Ibid.*; § 203(a)(4). But their waitnig period would be about eight years. In other words, the persons who represent the spillover of the naturalization of the veterans will have to wait in line and slowly fit into the mainstream of all other immigrants. In terms of the quota system, this would be a very orderly process.

We note that any increased immigration attributable to the veterans is insignificant in comparison with the legalization program for millions of aliens who have been living here illegally, as provided in § 201 of the Immigration Reform and Control Act of 1986, § 245A of the Immigration and Nationality Act, 8 U.S.C. § 1255A. In sum, the United States cannot expect a disruptive burden on the immigration system or the naturalization system simply because the veterans become citizens. As to the INS purported concern about weighing claims based on old facts, one can only say that making judgments is something naturalization courts do every day. Last, a veteran who chooses to take his opportunity to apply for naturalization in the Ninth Circuit, rather than in the less favorable Second Circuit, is not forum shopping. Petition for Certiorari at 14. Section 701 of the 1940 Act provides that a veteran may file his application in any forum he wishes.

The administration's foreign policy with respect to the nascent Republic of the Philippines was completely fulfilled in 1945-46. It is doubtful that the present government of the Philippines either knows or cares about the veterans' legal battles or their outcome. The INS has never claimed the contrary. Consequently, there is certainly no present governmental need to perpetuate that policy.

Nor does this case present any issues of significant or lasting public interest. The conclusion of the court of appeals that the Attorney General's action was incompatible with the will of Congress, as expressed in the language of the statute, necessarily depends on the particular facts of this case. As noted, those facts are unique and, realistically, will never happen again. In short, the outcome of this case can have no bearing on the outcome of other cases involving the constitutional separation of powers doctrine.

Respondents' Naturalization Is Not Barred By the Hibi Case or § 310(e) of the Immigration and Nationality Act

Neither *I.N.S. v. Hibi*, 414 U.S. 5 (1973), nor § 310(e) of the Immigration and Nationality Act, 8 U.S.C. § 1421(e), bar the respondents' claims. In addition to the decision below, this has been the ruling of the two courts that have dealt with the issues at length. *Olegario v. United States*, 629 F. 2d 204 (2d Cir. 1980), *cert. denied*, 450 U.S. 980 (1981); *Matter of theNaturalization of 68 Filipino War Veterans*, 406 F. Supp. 931 (N.D. Cal. 1975), *appeal withdrawn*, No. 76-1832, 9th Cir. (Nov. 11, 1977). The Court's holding in *Hibi* is specific: an estoppel against the government to assert the deadline of the 1940

Act does not rise from the failure to publicize fully the veterans' rights under the Act of 1940 or to station a naturalization examiner in the Philippines at appropriate times. 414 U.S. at 8-9. The holding was exactly coextensive with the question that the government presented in in *Hibi*. *INS v. Hibi*, No. 72-1652, Petition for Certiorari at 2.

In comparison, the present case raised and still raises the issues of whether the Attorney General constitutionally injured the veterans' rights by disregarding a congressional mandate issued in the exercise of Congress' exclusive naturalization power and by denying the veterans the equal protection of the laws guaranteed to them in the due process clause of the fifth amendment. These issues arise out of what is now correctly recognized as the Attorney General's deliberate frustration of the veterans' rights through the withdrawal of the naturalization examiner in the Philippines, not through a mere failure to station him there. This Court has already characterized the Attorney General's behavior as a clear error in the administration of the 1940 Act. *INS v. Miranda*, 459 U.S. 14, 18 (1982).[2] Moreover, the record, which the court below thoroughly examined, reinforces the statement in *Miranda*.

Realizing what had happened in 1945-46, the court below granted a remedy to vindicate the veterans' rights. In the last analysis, this remedy disturbs the INS because

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[2] The INS attempts to debunk this statement in *Miranda* as an off-hand, careless remark. However, the statement, brief as it is, serves a function in *Miranda*: it contrasts the unambiguous disregard of a statute in *Hibi* with the failure of such a showing in *Miranda*. To serve this obvious function, the statement must mean what it says.

it looks like equitable estoppel and not because this case is on all fours with *Hibi*. However, the fact that the remedy has a "close resemblance to an estoppel" is irrelevant because the veterans' claim do not now rest on an estoppel theory. *Lyng v. Payne*, — U.S. —, 106 S. Ct. 2333, 2340 (1986).[3]

Section 310(e) of the Immigration and Nationality Act, 8 U.S.C. § 1421(e), which prohibits the naturalization of anyone who cannot qualify for naturalization under current law, does not deprive the courts of authority to order the naturalization of the respondents under the old wartime law, given the Attorney General's error in withdrawing the naturalization examiner from the Philippines in 1945. Of course, such a suggestion would have no weight in the constitutional context, for § 310(e) could not be used to frustrate the remedy for a violation of due process. As *Olegario* noted, "the statutory amendment [i.e., § 310(e)] cannot negate the due process

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[3] Imposition of *Hibi* on this case will also result in the disparate treatment of two groups of veterans that are otherwise identical. Despite the outcome of *Hibi*, the government agreed to the naturalization of large numbers of war veterans in withdrawing its appeal in *Matter of the Naturalization of 68 Filipino War Veterans*. These included not only the veterans involved in that case, but others who had filed preliminary naturalization applications by November 30, 1977 when withdrawal of the INS appeal was accepted by the Ninth Circuit. The veterans, naturalized under *68 Veterans*, are, in material respects, identical to the respondents now before the Court. Thus, the denial of the respondents' naturalizations now on the grounds that their claims are controlled by *Hibi* would perpetuate an anomalous and unjust discrimination between two groups of veterans that do not differ from each other in any significant way. This Court in *Hibi*, sitting in equity, did not contemplate such a situation. Thus it certainly did not mandate such a result.

rights of a petitioner who alleges that he was unconstitutionally denied the opportunity to apply for a benefit decreed by Congress." 629 F. 2d at 220.

Moreover, there is no indication whatever that § 310(e) was enacted by Congress with the knowledge that veterans like these respondents had been deprived of their right to apply for naturalization by administrative conduct which contravened the mandate of Congress. In other words, § 310(e) was not intended to add injury upon injury to these veterans or to perpetuate the injustice created by the Attorney General's unilateral action in 1945.

The legislative history of § 310(e) shows only that the section was enacted to prevent certain lawful permanent residents of the United States from choosing to apply for naturalization under either the 1940 Nationality Act or the 1952 Act, whichever was more favorable to them. The possibility of such a choice had been provided by the savings clause of the 1952 Act and judicial interpretations of it. Congress felt that the election was unfair to persons who could only be naturalized under the more stringent provisions of the present 1952 Act. It also felt that it was cumbersome to administer two naturalization laws at the same time. *See* 1961 *U.S. Code Cong. & Admin. News* at 2981-82. *See also, e.g., United States v. Menasche*, 348 U.S. 528 (1955). The result of § 310(e) was to require lawful permanent residents who could previously choose between the 1940 and 1952 Acts to apply only under the 1952 Act.

The respondents here are not within the scope of this legislative history. They are not lawful permanent residents of the United States. Thus, if they lose their suit now, they will not be able to apply for naturalization under the 1952 Act, as were the persons who could no longer choose naturalization under the 1940 Act after the passage of § 310(e). Naturalization proceedings for the respondents now will not entail the continuing administration of an expired law because the numbers of veterans are necessarily limited by time if nothing else. The naturalization of the respondents will be unfair to no other person imaginable. Indeed, a failure to naturalize qualified veterans would be an ultimate unfairness to them for the simple reason that their service for the United States in World War II will be rewarded by their deportations.

The Decision Below is Correct. The Remedy Provided Is Proper and Appropriate

The court of appeals decided correctly that the wartime naturalization law delegated to the Attorney General no authority to do anything but naturalize qualified veterans wishing to apply and, therefore, that the Attorney General thwarted the will of Congress when he deliberately withheld the services of a naturalization representative from the Philippines in 1945 for the avowed purpose of preventing qualified Filipino veterans from being naturalized. The court was correct also when it ordered respondents naturalized, even at this late date, as the only appropriate remedy for the wrong that was done to them.

As for the delegation of authority issue, there can be no doubt about the message Congress sent to the Commissioner of Immigration and Attorney General when, in 1942, it provided for the naturalization of qualified servicemen and women who would be serving overseas during the

war, for § 705 directed them explicitly to "carry into effect" all the provisions of the law. There is simply no way to stretch the language of the law to fit the proposition, offered by the INS below, that § 705 impliedly clothed the Attorney General with the discretion to pick and choose among applicants, even for foreign policy reasons. As the court of appeals noted,

> ". . . the language of the statute is clear. It contains no express or implied delegation of authority to the Attorney General to deny the benefits of the Act to eligible aliens for any reason. Congress used language that was mandatory, not discretionary. It spoke, for example, of representatives 'designated' to process naturalization petitions overseas, not representatives who 'may be designated' § 702. It mandated that the Commissioner, with the approval of the Attorney General, 'shall (not may) prescribe and furnish such forms and shall make such rules and regulations as may be necessary to carry into effect the provisions of this Act.' § 705." (Appendix to Petition for Writ of Certiorari at 16a.)

Retreating from its earlier position, the INS now argues that the Attorney General needed no delegation of authority whatever from Congress to disregard the mandate of § 705 in light of the concerns assertedly expressed by Philippine officials. Instead, the INS now says, he could do what he did because the Executive Branch does not need congressional approval for the exercise of its foreign affairs powers. For unless "specifically negated," says the INS, "it is *always* the implied will of Congress to give the Executive Branch authority to implement legislation overseas in a manner which will not undermine this country's foreign policy interests." Petition at 17.

That argument, however, is founded upon a circumstance which is not present in this case. For as the INS itself points out, congressional deference to the President's foreign affairs powers has been implied only when the President or his subordinate act in a way that *implements* legislation, not when they frustrate legislation.

For example, in all of the cases cited by the INS to support its views, Congress had either specifically delegated authority to the Executive Branch or there was a history of congressional acquiescence in a particular administrative practice, from which a delegation could be implied in light of the President's foreign affairs powers.[4]

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[4] Thus in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), there was no doubt that Congress had delegated the President the power to trigger by proclamation, the sanctions provided by Congress prohibiting the sale of arms to participants in a South American war. The only issue was whether the delegation was lawful. In *Regan v. Wald*, 468 U.S. 222 (1984), this court found statutory support for a Treasury Department regulation barring certain currency transactions with Cuba. *Dames & Moore v. Regan*, 453 U.S. 654 (1981) upheld an administrative order suspending the claims of American citizens then pending in federal courts against the government of Iran. Although Congress had not explicitly authorized such an order, this court held that Congress had done so impliedly because of its acquiescence in a long standing practice of the Executive Branch to settle claims of American citizens against foreign governments. In *Haig v. Agee*, 453 U.S. 280 (1981), the issue was whether the Secretary of State exceeded his powers by revoking Agee's passport on the ground that Agee's conduct abroad was endangering national security and interfering with the nation's foreign policy. Although the Passport Act of 1926 did not expressly authorize the secretary's action, his action was affirmed because of a long history of congressional acquiescence in the State Department's revocation of passports on national security grounds.

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But this Court will search in vain for a case that says a delegation of congressional authority may be implied for acts which are incompatible with congressional intent. On the contrary, when the Executive Branch takes measures incompatible with the will of Congress, its power is at its "lowest ebb" and courts can sustain it only by "disabling Congress from acting on the subject." *Youngstown Sheet & Tube Company v. Sawyer,* 343 U.S. 579, 637-638 (Jackson, J., concurring).

(Continued from previous page)

Goldwater v. Carter, 444 U.S. 996 (1979) is not in point here, as this court found as premature an action brought by certain senators claiming that President's revocation of a U.S. treaty with Taiwan was illegal. Like *Curtiss-Wright, Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.,* 333 U.S. 103 (1948) involved a very plain delegation of authority from Congress to the Executive Branch, in this case to the Civil Aeronautics Board and the President to establish airline routes between the United States and foreign countries. In *Narenji v. Civiletti,* 617 F. 2d 745 (D.C. Cir. 1979), cert. denied, 446 U.S. 957 (1980) a regulation that discriminated against Iranian students during the American hostage crisis was upheld on the ground that Congress had impliedly delegated the authority of the INS to make such a rule in light of the broad authority Congress had delegated to the Attorney General to control immigration. In *Japan Whaling Association v. American Cetacean Society,* 54 U.S.L.W. 4929 (1986) this court found that action taken by the Secretary of Commerce was consistent with a treaty for the protection of whales. And, finally, in *Zemel v. Rusk,* 381 U.S. 1 (1965) this court concluded that because Congress had known of a State Department practice to preclude the use of American passports for travel to certain foreign countries for foreign policy or national security reasons, that Congress had impliedly consented to that practice when it enacted passport legislation. In this case, however, there certainly was no expressed delegation of authority to the Attorney General to deprive qualified applicants of the laws benefits. Nor was there any history of congressional acquiescence in any such practice.

This is particularly true when, as here, Congress has exercised the plenary authority it derives from the Constitution in the area of naturalization. U.S. Constit., Act. I, § 8, cl. 4. As the INS itself suggests, given Congress' exclusive naturalization powers "a naturalization court has no authority to dispense with congressionally mandated requirements for citizenship." Petition at 14, 22-23 citing *Fedorenko v. United States,* 449 U.S. 490, 517-518 (1981). What the INS forgets, however, is that the designated representatives of the immigration commissioner were, in effect, acting as naturalization courts with respect to overseas naturalizations under § 702 of the 1940 Act. Consequently, if naturalization courts are not free to ignore statutory provisions with respect to naturalization, then surely the Commissioner of Immigration and Attorney General were bound by the same limitation when they deliberately ignored the 1940's mandate to naturalize qualified veterans overseas. Plainly, they had no lawful authority to do so.

Moreover, §§ 701-705 of the Nationality Act of 1940 created for the beneficiaries of that act a right to apply for naturalization, a right to have their applications considered, and a right to be naturalized if found qualified. Precious rights, such as those, cannot be curtailed in the absence of an explicit delegation of authority by Congress. *Kent v. Dulles,* 357 U.S. 116 (1965). That kind of explicit authority is missing here.

The INS goes on to advance two other reasons why the court of appeals was wrong. Surprisingly, the first of these is that Attorney General did not "directly deny" respondents the benefits of the 1940 Act after all and somehow, therefore, did not violate the expressed will of Congress. For example, says the INS, the Attorney Gen-

eral did not direct that naturalization petitions filed by qualified veterans not be processed. Petition at 18.

In fact, that is precisely what the INS did in 1945. For those few veterans who submitted or tried to submit applications in 1945, or wrote letters of inquiry to the INS at its headquarters in the United States, were told in reply that they were out of luck unless they could come to the U.S. because the INS had no plans to send another naturalization representative to the Philippines.[5]

If the Attorney General did not "directly deny" the benefits of the 1940 Act or respondents, the INS at least concedes that his action had the "practical effect" of doing so because it left the veterans without anyone to process their applications in the Philippines. But that could have violated the will of Congress, says the INS, only if the statute required the Attorney General to ensure that all eligible veterans had a continuous opportunity to apply for naturalization during the time they were eligible for that benefit. That could not be what Congress had in mind, INS continues, because the Act necessarily afforded the Commissioner a degree of discretion in moving naturalization representatives from place to place. Petition at 18-19.

Obviously, § 705 was broad enough to allow the INS some discretion with respect to the allocation of limited naturalization personnel. But respondents were not denied their right to apply for naturalization because of

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[5] *See In re Naturalization of 68 Filipino War Veterans*, 406 F. Supp. 931 (N.D. Cal. 1975) for a discussion of "category I" veterans, i.e., those who tried to apply for naturalization in 1945 in the Pilippines but were rebuffed by the INS.

scheduling problems or the exigencies of war. Rather, they lost out because of a deliberate, intentional, premeditated decision by the Attorney General and Commissioner of Immigration to deny respondents the benefits of the law by revoking the authority of the naturalization representative who was already on the scene in post war Manila. As noted before, Congress did not delegate that kind of discretion to them.

Finally, the INS suggests that maybe Congress did not mean to provide for the naturalization of veterans who had been members of the Philippines Commonwealth Army (as distinguished from the smaller Philippines Scouts) before they were inducted into U.S. forces in 1940. The argument is premised upon the post-war enactment of an appropriations bill declaring that service in the Commonwealth Army was not to be considered as service in American armed forces. Petition 20, n.27. First Supplemental Surplus Appropriation Rescission Act, 1946, 60 Stat. 14.

But ever since *Petition of Munoz*, 156 F. Supp. 184 (N.D. Cal. 1957) and, in particular, throughout the Filipino war veteran litigation, the INS has accepted the district court's conclusion that the 1946 provision was meant only to save the the U.S. government money for veterans benefits such as termination pay and the GI bill. Consequently, the effect of that Act is not a part of this case and controversy.

Moreover, there is ample historical evidence that Congress must have intended to include members of the Philippines Commonwealth army in the benefits created by the wartime law. And that it did not intend a curtailment of those rights for fear of offending the nascent Philippines Republic. As already noted, for example, Con-

gress enacted the amendments at the very moment that the battles of Bataan and Corregidor were raging, and the exploits of Filipino soldiers were making banner headlines all across America. Second, Congress had enacted the Philippines Independence Act in 1934, 48 Stat. 463, and so it obviously knew in 1942 that the Philippines would become independent after the war. It also knew of the provision in the Act which authorized the President to make the Philippines Commonwealth army a part of U.S. forces, and that President Roosevelt had invoked that authority in 1940 Also § 701 included a provision making the law specifically applicable to veterans who "having entered the United States, *including its Territories and possessions,* prior to September 1, 1943, being unable to establish lawful admission to the United States serves honorably in such (U.S.) forces beyond the continental limits of the United States. . ." (emphasis added). As the court of appeals noted, the Philippines was then the largest U.S. possession and provided a reservior of manpower far greater than any other possession. It seems impossible then to suppose that Congress did not have all qualified Filipino veterans in mind, including Commonwealth army soldiers, when it enacted the foregoing provision.

This is not a case where there is a wrong without a remedy. If the Attorney General deprived the veterans of their statutory right to apply for naturalization without due process of law, a court can fashion an appropriate remedy. *Swann v. Board of Education,* 402 U.S. 1 (1970). The only appropriate remedy is the naturalization of the veterans.

Olegario suggests a parallel, but non-constitutional, analysis which also leads to the remedy of naturali-

zation for qualified veterans. The analysis depends upon the proposition that, when an administrative agency contravenes a statutory mandate, thereby acting in excess of it powers, the federal courts have jurisdiction to provide the injured party with a remedy as a matter of equity. Support for this proposition is found in *Leedom v. Kyne,* 358 U.S. 184 (1958), cited in the *Olegario* footnote. 629 F.2d at 226, n.9.

Leedom dealt with an issue that is analagous to the issue in this case. Under the nation's labor laws, certain professional employees were given the "right" to veto their representation by a collective bargaining unit which, without their consent, included non-professional employees. When the National Labor Relations Board certified such a bargaining unit, despite the lack of consent by its professional members, the Court found that the Board's action was

> "an attempted exercise of power that had been specifically withheld. It deprived professional employees of a 'right' assured to them by Congress. Surely, in these circumstances, a Federal District Court has jurisdiction of an original suit to prevent deprivation of a right so given."

358 U.S. at 189.

The Court concluded that the district court had jurisdiction to fashion a remedy because it found that nothing in the National Labor Relations Act had precluded the district courts from exercising original jurisdiction.

From *Leedom,* it follows that when the Court of Appeals concluded that the Attorney General acted in excess of his powers in this case, it could also provide the injured veterans with the only remedy that makes sense—their

prompt naturalization. Moreover, as stated in the *Olegario* footnote, there is nothing in the 1940 Nationality Act, its legislative history, or related subsequent provisions which either expressly or implicitly precludes judicial review.

A balancing of the equities in this case points to the appropriateness of naturalization. On the one hand, there has been a serious injury to the veterans which only naturalization can redress. On the other hand, the government is not injured at all. The 1940 Act applies only to the respondents and veterans like them. The historical facts are unique. As discussed above, the numbers of veterans are not very great. The "spillover" effect of their naturalization would be gradual and orderly. The families of the veterans are only a few of the thousands that immigrate from the Philippines yearly. The naturalization system will not be burdened by a flood of cases. The INS and naturalization courts should have no more difficulty assessing the credibility of a veteran's claim than they have in judging any other issue of fact. Above all, it is about time the United States honored the promise of American citizenship it made to these veterans so long ago.

CONCLUSION

At least one INS official recognized the conduct of his superiors for what it was. He was Edward J. Shaughnessy, special assistant to the Immigration Commissioner, who wrote on October 19, 1945 that revocation of the naturalization representative's authority in Manila created "the rather anomalous situation that while we recognize in law the legal right of these persons to the benefits of

the Act, we have from an administrative standpoint made it impossible for such persons to acquire these benefits." *See* opinion below, Appendix to Petition for Writ of Certiorari at 21a. Also, *Olegario v. INS*, 629 F. 2d at 210 and *68 Filipinos*, 406 F. Supp. at 936 n.6.

That indeed is exactly what happened here. The Attorney General, instead of being content with his role to see that "the laws are faithfully executed," usurped for himself the role of lawmaker by determining that these respondents and other Filipino veterans should not be naturalized despite their qualifications under the law. Plainly, his conduct was unlawful. Respondents should be naturalized. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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